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IN THE
Supreme Court of the United States

OCTOBER TERM, A.D. 1954.

No. 7

WILBURN BOAT COMPANY, et al.,
Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

Brief for the Respondent

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Brief for the Respondent

OPINION BELOW

The opinion of the Court of Appeals is reported at 201 F.(2d) 833 and printed in the record at 199-206. The opinion of the District Court is unreported but is reprinted in the record at 19-20.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court's judgment in favor of Respondent (defendant below) was entered on January 29, 1953. A petition for a writ of certiorari was filed on April 29, 1953, and was granted on April 26, 1954. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

I.

Is a typical policy of marine insurance underwritten between widely separated parties in peculiar reliance on the statements of assured by their agent and covering the hull of a distant vessel against full marine risks on the navigable waters of the United States in several states a maritime contract, derived from and governed by the substantive general maritime law?

II.

Has a state power to change the validity and effect of material terms as they are written in a maritime contract and strictly enforced by the general maritime law, and specifically, warranties of the assured in a marine insurance policy going to the physical and moral risk on the hull of a navigating vessel against sale, pledge, and commercial use of the vessel, and, especially, by annulling such terms; or, by requiring one party to the maritime contract to show some further fact, irrelevant alike to its terms as written and its obligation under the general maritime law, and to sustain the burden of proving such further fact before permitting reliance on the terms of the maritime contract as written and as strictly enforced by the general maritime law; and does such change take the right of the party relying on the terms of the maritime contract as written and as strictly enforced by the general maritime law, to have the validity and effect of its terms governed by the substantive general maritime law under Art. III, Section 2 of the Constitution of the United States?

III.

Was it the intent and effect of the McCarran Act to return to the states a general power assigned by Constitution Art. III, Section 2, to the Federal sovereign to change the substantive general maritime law governing contracts of marine insurance; and, if so, is the McCarran Act valid in that application?

IV.

Does a presumption of correctness attend the judgment (which was dismissal), and, if so, have Petitioners shown any applicable law whereby dismissal was wrong?

V.

Can Texas law be applied to determine the validity and force of this contract without depriving Respondent of due process under the Constitution, Article XIV (Amendment)?

VI.

Would Texas law require any different judgment than was entered?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article III, Section 2—UNITED STATES CONSTITUTION

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *, to all Cases of admiralty and maritime jurisdiction; * * *

Article XIV—AMENDMENT TO THE UNITED STATES CONSTITUTION SECTION 1

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Article VI—UNITED STATES CONSTITUTION

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Title 15—UNITED STATES CODE, Chapter 20, “Regulation of insurance” 15 USC 1011-1015. (The McCarron Act)

15 USC 1011—“*Declaration of policy.*”

“Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”

15 USC 1012—“*Regulation by State Law; Federal law relating specifically to insurance; applicability of Certain Federal laws after June 30, 1948.*”

“(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”

“(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; * * *.”

15 USC 1014—*Applicability of Merchant Marine Act of 1920.*

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the * * * Act of June 5, 1920, known as the Merchant Marine Act, 1920.

28 USC 1333—*Admiralty, Maritime and Prize Cases*

“The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

Illinois Revised Statutes, 1949, Chapter 73, Sec. 766 (Illinois Insurance Code, 1937, § 154 entitled “Misrepresentation and Warranties.”)

“No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy

of insurance or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. This section shall not apply to policies of marine or transportation insurance."

Oklahoma Statutes, 1951—Chapter 36, Sec. 2 (in material part);

"All contracts of insurance on property, lives or interests in this State shall be deemed to be made therein."

VERNON'S TEXAS STATUTES—Revised Civil Statutes 1936, Article 5054, entitled "*Texas Laws Govern Policies*" (Art. 21.42 of 1951 Texas Insurance Code)

"Any Contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

VERNON'S TEXAS STATUTES—Revised Civil Statutes, 1936, Article 4880 entitled "*No Company Exempt.*"

"Every fire insurance company, every marine insurance company, every fire marine insurance company, every

fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire on property within this State, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State or to some foreign county (sic), whether such company is organized under the laws of this State or under the laws of any other state, territory or possession of the United States, or foreign country, or by authority of the Federal Government, now holding certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this subchapter and that it agrees to transact business in this State, subject thereto; it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this subchapter, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire."

VERNON'S TEXAS STATUTES—Revised Civil Statutes 1936, Article 4890—entitled "*Lien on Insured Property*" (1951 Texas Insurance Code, Art. 5.37)

"Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void and shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

VERNON'S TEXAS STATUTES—Revised Civil Statutes 1936,
Article 4930, entitled “*Breach by Insured*” (1951 Texas
Insurance Code Art. 6.14)

“No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property.”

STATEMENT AND SUMMARY OF ARGUMENT.

The Petitioners' Brief does not correctly state the case. It is calculated to obscure and distort the facts at nearly every point where the circumstances underscore the problem of multiple sovereignty with respect to the validity and effect of maritime contracts such as that before the court, and the Federal solution of that exact problem by the Constitution in a "separate and distinct grant" (*The Belfast*, 7 Wall. 624, 640) with respect to "all matters of admiralty and maritime jurisdiction."¹

Petitioners' selective and incorrect statements serve, second, to suggest an atmosphere of the sectionalism that so long deferred the formation of the Federal Constitution with its admiralty clause. (Cf. P. Br. 11)

Third, the same aspects of Petitioners' presentation are designed to obscure the integral character of the contract of marine insurance and the general maritime law. It was the difficulties of multiple sovereignty, as sharply illustrated by the real facts here, that at some times and places had enforced some acquiescence even of completely independent sovereigns in a separate jurisdiction administering a sort of "*jus gentium*" to govern maritime affairs.² The significant fact is that the contract of marine insurance grew from that jurisdiction, that it "sprang from the

¹ "It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states,' etc."

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 383.

² In *Croudson v. Leonard*, 4 Cranch (8 U.S.) 434 (1808), an action on a marine policy of hull insurance, it was pointed out that marine insurance came into England from a country that acknowledged the civil law" and that "this must have been the law of the policies."

law maritime and derives all its material rules and incidents therefrom." *Insurance Co. v. Dunham*, 78 U. S. 1, 31 (1870).

Fourth, the elisions of Petitioners' presentation enable them to put the whole question of the correctness of the judgment of dismissal in a false light, making it appear for a moment that but for the admiralty or maritime law they could have recovered under the statutes of Texas. Toward the end of Petitioners' Brief, however, it appears that they cannot even try to excuse one of their breaches (selling the vessel) by any Texas statute or doctrine. They argue that the concurrent courts below were wrong in finding as a fact (R. 19) that it constituted a breach of the contract to sell their interest in the vessel. (Br. 11-12) As we understand, that argument is not open to them here³ and the judgment of dismissal was necessary in any event. "One breach is sufficient." (R 203)

Petitioners' Brief never discloses, however, that among other things this contract was made, issued and delivered in the State of Illinois (by an insurer not shown ever to have done any business in Texas or even to have solicited any there);⁴ that the vessel cruised the navigable waters

³ Besides the two court rule Petitioners presented no such question on their petition, as they admit. (Petitioners' Br. 30)

⁴ Even the purported copy of a document of authority to do business in Texas attached to Petitioners' Brief at page 33 as "Appendix A" is not based on anything in the record. Except for the advices of the Clerk that it would be disregarded if not in the record a separately printed motion to strike such "Appendix A" would have been presented. We do move that it be stricken—together with the argumentative references thereto occurring throughout Petitioners' Brief (*Schley v. Pullman Car Company*, 120 U. S. 575, 578). The same motion is made with respect to "Appendix B" at page 34 of Petitioners' Brief on like grounds. (fn. 4 cont'd p. 11.)

of the United States under the coverage of this policy against navigating perils in five states as the map of the permitted waters shows (R. 169); that her regular berth in those waters was in Okiahoma (R. 7181) where she was destroyed (R. 62, 63); that her presence in the State of Texas on those waters was occasional and transitory (R. 82); that the State of Illinois, where this Respondent was sought out and solicited to enter into this contract and where this policy was issued and even delivered⁵ by express statutory provision has left the effect of warranties in policies of marine insurance to be governed by the maritime law.⁶

⁴ (cont'd)

We point out that on the actual record the first and second "Questions Presented for Review" by Petitioners' Brief as there stated (p. 5) do not arise.

⁵ *Fidelity Mutual Life Assn. v. Harris*, 94 Texas 25, 57 S. W. 635, 639 and auth. cit.; *Wenz v. Business, etc., Ass'n*, 212 Ill. App. 581, 583-584; *Jackson v. New York Life Ins. Co.*, 7 F. (2d) 31, 32 (CA 9, 1925).

⁶ Illinois *Insurance Code* of 1937, § 154; Illinois Revised Statutes (1949 ed.) § 766:

"No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. *This section shall not apply to policies of marine or transportation insurance.*" (Our emphasis)

For the common law of Illinois see *Norwaysz v. Thuringia Insurance Company*, 204 Ill. 334; 68 N. E. 551 (1903).

If parties were now to be forced to consider competing claims of state laws to govern a maritime contract, the claim made by the legislature of the equal and sovereign State of Oklahoma to treat all insurance on property in that state as having been made in that state, would have to be considered. (36 *Oklahoma Statutes Annotated*, § 2.) The fact is, as Petitioners' Brief does not disclose, that the application of the Texas statute concerning mortgaging insured property is similarly addressed to property "in" that state. If state laws were the governing laws for marine contracts, the question would thus be: which state was this property "in"? It was, of course, a navigating vessel on the navigable waters of the United States and from time to time it was "in" both. Each state is final, however, as to the meaning of its own laws. Neither could exclude the claim of the other. The result in many instances could depend—under Petitioners' views of state powers to govern maritime contracts—on whether the plaintiff filed his suit in one state's court house or another's. Oklahoma would appear to have the stronger claim to govern the insured property on the basis that it was "in" that state. The regular berth of the insured vessel was in Oklahoma (R. 71) where a dock was built for her (R. 75, 81); the violation of the stipulation against sale of the vessel was by sale to an Oklahoma corporation (53, 54, 77, 78, 79); and her destruction on which an insurance loss is now asserted, occurred in that State (R. 52) while owned by a corporation of that State (R. 24, 25).

Parties seeking to enter into such a maritime contract under state laws would be faced with problems (of a sort on which judges have differed) as to whether the law of Illinois where the contract was made, or the law of Oklahoma, would govern all or some aspects of their relation.

Oklahoma has enacted: “§ 2. * * * All contracts of insurance on property, lives or interests in this State shall be deemed to be made therein.” (36 *Oklahoma Statutes Annotated*, §2.) And any like claim of Mississippi, where the vessel was when the Wilburns got this insurance, would have also to be weighed (to say nothing of Louisiana and Arkansas, where the vessel also navigated under this policy)—if state laws were now to govern maritime contracts of insurance on vessels moving on the navigable waters of the United States.

The necessity and obvious purpose of the admiralty clause written in the organic document making several independent states into one nation, has been declared and enforced by this Court in a long line of decisions, referred to below. If parties to maritime contracts were now required to balance the competing claims of states to subject maritime contracts to their laws, this case illustrates that they would have to enter upon an analysis of the laws of many states, including what all those laws might be at the time with respect to the many problems presented by such a contract, and what the rules of those states were, at the moment, in the frequently uncertain field of “conflicts of law.”

Indeed, if Petitioners’ contention is correct, and Texas has subjected, and can subject, to its law every insurance contract payable to any of its “inhabitants,” then any sovereign state would have the same power. The same assured from time to time can, and does, inhabit several states of the nation; frequently, as here, there are several assureds. Were one of several assured to be⁷ or to become

⁷ No residence address for Glen Wilburn was shown as of the time when the contract was made; possibly he inhabited Burns Run, Oklahoma, where the vessel was regularly berthed. (The fourth Petitioner is an Oklahoma corporation not domesticated in Texas.) (R. 24, 25)

an inhabitant of Oklahoma, while another or others inhabited Texas, and a third Mississippi (where the vessel was when the Wilburns contracted) the same maritime contract could then be ruled by three sets of law, one for each payee—if state statutes having the effect for which Petitioners contend can override the general maritime law in the government of maritime contracts. Corporations are often assureds; they are easily domesticated in several states at the same time.

Reflection multiplies illustration; as litigation would have done but for the fact that parties to marine insurance contracts have been relieved of “the unnecessary burdens and disadvantages of discordant legislation” by a “separate and distinct grant” committing all “matters of admiralty and maritime jurisdiction” to a Federal sovereign for all the navigable waters of the United States.

In view of all the facts as finally crystallized in the record of a trial, and after considering the decisions of this Court, we argued to the courts below (R. 149-150, 205) that even the rudimentary concepts of fairness imposed by the due process requirements of the XIVth Amendment, limiting the power of states to give their laws extra-territorial effect, would in any event exclude Texas laws here. See: *Hartford Ins. Co. v. Delta Co.*, 292 U. S. 143, 149, 150 (1933); *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 434-435 (1926); *Hanover Ins. Co. v. Harding*, 272 U. S. 494, 514, 517 (1926). Both courts held that Respondent's other constitutional right—its right under the admiralty clause that the validity and effect of this distinctively maritime contract should be governed by the general maritime law, not by state laws—was clear and controlling. Other questions were not passed on. (R. 205) Petitioners make no argument that this judgment was wrong under any law but Texas law.* Their sole argument here is that it

* It certainly was right under the law of Illinois where the policy was underwritten, issued and delivered (*Ill. Ins.* (Fn. 8 cont'd p. 15))

was wrong under Texas law. The XIVth Amendment, without more answers that. For under the XIVth Amendment Texas law, whatever it is, cannot apply. (Auth. cit.)

The judgment was dismissal. Every presumption of correctness attends the result.⁹ Petitioners must show a law, that could apply, under which the judgment was wrong, or the attack on the judgment fails as their argument recognizes.

The fact that the courts below found it unnecessary to pass on Respondent's right under the XIVth Amendment (or even if they had ruled against it) would not make it any less available here in support of the judgment. *Langnes v. Green*, 282 U. S. 531, 538-539 (1930).

Marine insurance is characteristically desired in a hurry, on a transitory subject matter, far from the place where it is underwritten (as the brief for the learned *amicus curiae* also makes plain). Petitioners do not disclose that this was the situation here.¹⁰ In the nature of marine

(Fn. 8 cont'd)

Code of 1937, § 154, codified in *Ill. Rev. St.* (1949 ed.) § 766, *supra*; *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334; 68 N. E. 551 (1903) *supra*. It was equally right under the law of Oklahoma. See *Deming Investment Co. v. Shawnee Fire Ins. Co.*, 16 Okla. 1; 83 Pac. 918 (1905). Oklahoma has no legislation affecting these contract terms.

⁹*Bagnell v. Broderick*, 38 U.S. 436, 446 (1839); *Townsend v. Jemison*, 48 U.S. 706, 724 (1849)

¹⁰ Petitioners' omissions and incorrect statements have forced us to print as an appendix a substantial portion of the depositions showing the method of underwriting, where the contract was made, and the relations of the parties, the depositions introduced by them at the trial as their Exhibit 4 (R. 95). For rulings of the court excluding portions thereof, see R. 113, 115, 116, 120 and 122. The original of these depositions is on file in this Court pursuant to stipulation filed herein. Appendix references are indicated: "Dep. ...a."

insurance situations (including this one) their necessities cannot be met without crippling delay and expense unless the assured's representations are accepted as the basis of the underwriting (cf. Brief for the *Amicus Curiae*, pages 10, *et seq.*). That is the way marine hull insurance is underwritten. (Dep. 8a)

The maritime law, which reflects this practice alone makes it possible, by its characteristic rules, one of the most fundamental of which is that express terms of warranties to be performed by the assured are literally enforced. (Cf. R. 202 and brief for the learned *amicus curiae*.)

The Wilburns bought this yacht in Mississippi (R. 59) on June 4, 1948, and wanted insurance on her against navigating perils. (Dep. 17a) They turned over the matter of getting insurance for them to a Mr. McKinney who was in the insurance business as "R. L. McKinney Agency" at Denison, Texas (R. 89). He handled ninety per cent of the Wilburns' insurance matters. (R. 89) They asked him to get the insurance for them. (R. 70) Admittedly, his status in this matter was that of their agent representative. (R. 80; Dep. 3a, Dep. 16a)

McKinney himself had no facilities for placing vessel insurance. (Dep. 3a)

McKinney telephoned (Dep. 3a) and later wired (Dep. 16a) to H. H. Cleaveland Agency, an insurance agency (Dep. 2a) in Rock Island, Illinois. (Dep. 2a) In this telephone conversation and correspondence¹¹ he gave the description of the risk (Dep. 3a) and asked this Illinois agency, Cleaveland, to contact its insurance carrier for insurance (Dep. 3a) on this yacht. (R. 171 and see R. 85).

¹¹ His contacts with Cleaveland were through Cleaveland's people, White and Rossow, whose depositions are appended.

Cleaveland had no general authority to act for this Respondent on risks so far away, as Petitioners' Brief admits. (Petitioners' Brief 7)

Accordingly, in June, 1948, the broker, Cleaveland, approached this Respondent at its Western Marine Office in Chicago, Illinois, by telephone, mail and personal visit, submitting the oral application on the information supplied to it by McKinney.¹²

The request was for insurance against navigating perils subject to standard *yacht* conditions (Dep. 17a) and Cleaveland's man who made the request testified that was what he got. (Dep. 17a)

As Petitioners' Brief states, the policy had been originally issued to Marshall and Shuler from whom the Wilburns bought the vessel, and was then subject to a "port insurance" endorsement warranting her confined to the harbor of Greenville, Mississippi.¹³

The endorsement solicited by Cleaveland reinstated all terms under the heading "Conditions" (R. 173) including the warranty conditions which Petitioners violated, cover-

¹² The written "application and survey" whose false statements Petitioners apparently seek to excuse on the ground that it was later prepared by their insurance man McKinney (Petitioners' Brief 7) was not asked for until long afterwards. (Dep. 46a) Petitioners say (Petitioners' Brief 7) it was forwarded (by Cleaveland) to Respondent in February, 1949, a date months after any insurance transaction and only shortly prior to the burning of the vessel which occurred on February 25, 1949.)

¹³ Port insurance: See R. 243-244, and *Robinson v. Home Ins. Co.*, 73 F (ad) 3 (CCA5, 1934); cert den 294 U.S. 712.

age against "perils of the seas" (R. 173, cf. Arnould, *Marine Insurance*, 13th ed. 812), negligence of "masters, mariners, engineers or pilots" (R. 174; cf. *Read v. Agricultural Ins. Co.*, 263 N.W. (Wis. 632, 634), and against liability for collision "with any ship or vessel" (R. 174; cf. Arnould, *Marine Insurance*, 13th ed. 792).

The new endorsement was mailed by Respondent to Cleaveland (R. 165) which signed it (R. 165) and forwarded the endorsement and the policy to which it appertained to McKinney. (Dep. 20a)

When McKinney later (long after he and his clients were in possession of the policy carrying these terms) wrote to Cleaveland, the broker, stating that assured had an investment of \$40,000 in the vessel and suggesting to Cleaveland the possibility of securing an increase to that amount (Dep. 4a) the same course was followed. (Dep. 5a) The Illinois underwriter, approached again by Cleaveland at McKinney's request, agreed to "bind" the increased amount before any endorsement increasing it was prepared. (Dep. 42a) This endorsement when prepared in Chicago was sent to Cleaveland in Rock Island (Dep. 50a) for Cleaveland's signature, and then mailed to McKinney.

The transaction at every step followed that course: request by assured's agent McKinney to Cleaveland in Rock Island, Illinois; approach by Cleaveland's man to respondent in Chicago; binder, issuance, signature, and mailing-in Illinois. (Dep. *passim*.)

The real facts are in contrast with statements of Petitioners' Brief that the policy was "issued and delivered" at Denison, Texas. (Petitioners' Br. 6) It was "issued" in Illinois (*vide supra*) and the mailing in Illinois was its "delivery" in every sense material to the question of

where the contract was made and completed. (*Fidelity Mutual Life Ass'n v. Harris*, 94 Tex. 57 S.W. 635; *Jackson v. New York Life Ins. Co.*, 7 F (2d) 31, 32 (CA 9, 1925); *Wenz v. Business Men's Accident Ass'n.*, 212 Ill. app. 581, 583-4¹⁴)

The real facts are similarly in contrast with Petitioners' statement that the policy "was purchased from R. L. McKinney Agency." (Petitioners' Brief 6-7) McKinney, who had "no facilities" for placing vessel insurance (*vide supra*) was the man whom the Wilburns "sort of elected" to get this insurance for them. (R. 80) The Wilburns gave him ninety per cent of their insurance business (R. 89) and he took over this job for them, applying to the marine insurance market in Chicago through an Illinois broker for the purpose. (*Vide supra*.) The policy and its endorsements was not signed by him but by the Rock Island brokerage house in Illinois, thereunto specially authorized in every instance. The statement of Petitioners' Brief that the premiums were "delivered" to McKinney (Petitioners' Brief 7) is ambiguous. The premiums were not paid to him, but were paid by checks to the order of H. H. Cleveland Agency, Rock Island, Illinois (R. 89a and 195a) which he forwarded. McKinney's status was admitted at the trial to be that of the chosen representative of the Wilburns (*vide supra*) to "secure" this policy for them, which he did through an Illinois agency.¹⁵

¹⁴ We suppose this would be evident to Petitioners if a loss had occurred while the policy was in the mails.

¹⁵ Considerably after these contacts were established McKinney wrote Cleveland that he had "recently" made arrangements to represent Respondent, a statement which the trial court struck out on familiar principles. (R. 115) No complaint was made of the correctness of the ruling at the trial or afterward; Petitioners never called their man (Fn. 15 cont'd p. 20)

Petitioners' irrelevant insistence that they were in the grocery business (the vessel was owned by an Oklahoma corporation in the commercial boat business when she was burned) takes on a peculiar cast when in fact Petitioners were represented by their chosen man in the insurance business. (*Vide supra*) They neglect to state that they even went over this yacht policy with their own insurance man. (Dep. 57a).

There are other errors in Petitioners' presentation. Among them, Petitioners say they are "citizens of Texas." Petitioners are Wilburn Boat Company, an Oklahoma corporation, with which Respondent never contracted, and three individuals. At the time when only two of the individuals were assureds, the policy said they were "d/b/a Wilburn Brothers, Denison, Texas." (R. 168) This was amended, effective August 6, 1948, when the third individual was added, eliminating even any business address. (R. 165).

Petitioners omit the facts as to the voyaging of this vessel in five states, her regular berth in Oklahoma, and the transitory nature of any presence in Texas, but state, incorrectly, that her "registered" hailing port (Petitioners' Br. 6) was Denison, Texas. Hailing ports are not "registered," but painted on the stern; there is no evidence that anything was painted on the stern of the Wanderer.¹⁶

(Fn. 15 cont'd)

McKinney to testify. The record is clear that McKinney was assured's agent in the evidence of J. F. Wilburn (R. 70, 80) and the course of the negotiations as shown by the depositions offered by Petitioner (See especially Dep. 3a, Dep. 16a.)

¹⁶ "A vessel of the United States must have a 'hailing be the same but if they are not it is the 'hailing port' de- port' as well as an approved home port. These ports may fined by this statute [46 U.S.C.A. 47] that must be shown on the stern as required by R. S. § 4718 as amended (Section (Fn. 16 cont'd p. 21)

Reference to R. 168 is made by Petitioners to support their statement (Petitioners' Br. 6) that the vessel was "documented" at Houston (far from the waters permitted by this policy.) (R. 169). That reference is on a recorder's note on a bill of sale conveying the vessel to an Oklahoma corporation. (R. 48) Further it appears that both when the Wilburns purchased the vessel, as also when she was sold to the Oklahoma corporation, her "document," viz., her "*Latest Consolidated Certificate of Enrollment and License*" (R. 44, 48) was one that had been issued "at the port of Chicago, Illinois." (R. 46, 50)

Petitioners state that the policy was "made payable" at Denison, Texas, referring to Record 168. (Petitioners' Br. 7) The reference is to the business address shown when two of the Wilburns were the assureds. (As stated, even this was eliminated by amendment.) (R. 165) No place of payment was ever specified in the policy.

However, the policy does name three offices of the Respondent—San Francisco, Chicago and New York—(R. 171, 180) and calls for notice of loss at "the nearest office of this Company or to the Agent who shall have issued this Policy." (R. 176) The latter was Cleaveland, of Rock Island, Illinois. (R. 172) (Cf. *Hartford Ins. Co. v. Delta Co.*, 292 U. S. 143, 149, 150 (1933).)

(Fn. 16 cont'd)

238 of this volume)." *Arzt, Navigation and Safety*, 326-327. The hailing port may be any one of several places, including a "port" (Denison is *not* a port) where "one or more" of the owners reside. 46 U.S.C.A. 47. There is no evidence as to where L. G. Wilburn resided when the three Wilburns purchased the vessel. For some time before the vessel was lost she was owned by "Wilburn Boat Company, a corporation not domiciliated in Texas, whose office and principal place of business was Durant, Bryan County, Oklahoma." (R. 48)

Petitioners' incorrect assertions as to the admitted status of their own agent, McKinney, have been partially commented upon. Further misleading statements concerning McKinney occurring in Petitioners' Brief are that he "examined, inspected and evaluated the risk," made a survey of the boat "for respondent," and "reported to respondent concerning the risk." (Petitioners' Br. 7) These are not correct statements. The inference from them might be that he was Respondent's designated representative to act for it in these particulars. As appears above, this is the exact reverse of the truth. Incidentally, McKinney never had any contact with Respondent, but only with Cleaveland (Cf. Depositions). McKinney's acts were those of the Wilburns, including the representations which he made to Cleaveland, for Cleaveland to convey to Respondent in order to get the insurance. (See *Eagle Star v. Tadlock*, 22 F. Supp. 545 (S.D. Cal. 1938) on 548, collecting authorities.)

Petitioners avoid any flat statement that McKinney was Respondent's agent. But they omit the explicit record and admitted fact that his status in this matter was that of the Wilburns' agent (*vide supra*) and indulge the inaccuracies referred to. Neither Respondent's underwriter in Chicago, nor any one else "for" it, examined or inspected or surveyed the risk. The underwriting was immediately effected on the representations of assureds' agent McKinney, transmitted to the underwriter by Cleaveland, all in reliance on the representations that came from assureds through assureds' representative, McKinney, and transmitted to Respondent by Cleaveland. (*Vide supra*.) Afterwards, when the underwriter asked assureds to furnish an application and survey it was to enable the underwriter to judge value (Dep. 46a); the request was

that *assureds* have some "competent marine surveyor" make a survey. (Dep. 46a) None was furnished until shortly before the vessel was burned (*Vide supra.*); the signature on it is that of Petitioner J. F. Wilburn and the only other person claimed to have had anything to do with it was McKinney (P. Br. 7).

Marine insurance contracts are *uberrimae fidei* and unless the underwriter is put in possession of all the facts material to the risk or premium they are void. *Stecker v. American Home Fire Assur. Co.*, 299 N. Y., 1, 6. Indeed, this policy explicitly declared that it was void in event of "any misrepresentation or concealment, whether before or after loss." (R. 176)¹⁷

¹⁷ Marine underwriting in order to meet the needs of maritime transactions, is characteristically done on subject matter at a distance, in favor of parties at a distance, and wanted in a hurry, all illustrated here. Obviously it could not be so conducted if distant representatives of the assured who furnish false, inaccurate and incomplete information, were to be translated into agents of the underwriter capable of binding or estopping him by their own knowledge that their own representations were false, inaccurate, or incomplete. (In this connection see the Brief of the learned *amicus curiae* and *Roseman v. Ins. Co.*, 301 U. S. 196, 206; *Hartford Fire Ins. Co. v. Walker*, 94 Tex. 473; 61 S. W. 711; *Retailers Fire Ins. Co. v. Jackson Gin Co.*, 10 S. W. (2d) 799 (Tex. Civ. App.), *U.S. Fidelity & Guaranty Co., v. Taylor*, 273 S. W. 320 (Tex. Civ. App.).) At Brief 7

Petitioners say McKinney "thought he had told respondent that the property was conveyed to a corporation," referring to Rossow's exhibit No. 41. The reference is to a letter McKinney wrote to Cleaveland after the loss, which the lower court struck out. (R. 116) Over and above the impropriety of referring to unsworn statements of Petitioners' agent after the loss which the trial court eliminated except for other purposes (without complaint then or later as to the ruling), it is difficult to account for Petitioners' (Fn. 17 cont'd p. 24)

At page 7, Petitioners' Brief states that the Wilburns "changed their partnership into a corporation" and that each of the named assureds "retained their same interest in the boat in that they each owned one-third of the stock of the corporation. (See Appendix B.)" Appendix B so referred to as the basis of this argumentative statement is no part of the record, as above pointed out. As here appears it is the basis of the only argument made by Petitioners (Petitioners' Br. 29, *et seq.*) to attack the findings below that the sale of the vessel violated the policy, *viz.*, that when they sold their owners' interest in the vessel to a corporation the assured interest was not "changed," which is patently incorrect.¹⁸ The argument proceeds, moreover, on a revision of the policy which plainly says that the assured interest shall not be "sold." (R. 176) It is stipulated that it *was* sold. (R. 25) As pointed out, this stipulated breach is not defended by Petitioners on any Texas statute but on "common law" grounds. Elsewhere they insist that there is no difference between admiralty and common law as to the rule that warranties must be literally complied with in an insurance contract. (Petitioners' Br. 11)¹⁹ The question they seek to raise

(Fn. 17 cont'd)

remark on any consistent theory. Both courts below held the sale to the corporation a fatal breach. (R. 203, 19-20)

¹⁸*White v. Evans*, 117 N. J. Eq. 1, 174A, 731, 732, (1934); *Bowling v. Continental Ins. Co.*, 186 W. A. 164, 103 S.E. 285, 287 (1920).

¹⁹ Apparently Petitioners feel that no rule that characterizes the maritime law is part thereof, if it also characterizes the common law of some or one of the states.

They state that the District Court cited *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, which, as they there point out, is a common law case, "to establish the rule that admiralty law governs" going on to say that the Texas legislature "enacted a statute requiring the (Fn. 19, cont'd p. 25)

as to whether this stipulated breach, found by the concurrent courts below, was a breach or not, is not presented by the Petition as above pointed out.

At page 8 Petitioners say that after a corporation was formed "the respondent by written endorsement changed the named assureds to read as follows: 'Glen, Frank and Henry Wilburn d/b/a Wilburn Boat Company.' This endorsement was effective August 6, 1948." If the intent of this statement is to suggest that this endorsement was an ineffective attempt by Respondent to make the policy run to a corporation, one answer would be that there is no such evidence; but a conclusive answer here would seem to be that the concurrent courts below both found the sale to the corporation to be a breach of the policy requirement that the insured interest should not be sold, and no question is presented as to correctness of the finding.²⁰

Similar considerations and others deprive Petitioners' suggestion (Petitioners' Br. 9), that the maritime law does not "recognize" a common law mortgage, of the (unspecified) significance they attribute to it. Aside from the

(Fn. 19 cont'd)

insurance company to prove that the breach of warranty contributed to the loss" in order to do away with the doctrine announced by that common law case. (Petitioners' Br. 11) It is highly unreasonable to suggest that the District Court cited a common law case to show "that admiralty law governs." Petitioners are aware that the Texas statute to which they refer as changing the common law there does not excuse their breach in selling the vessel. (See: *Citizens State Bank v. American Fire & Casualty Co.* 198 F(d) 57 (CA5, 1952) And they do not seek to excuse that breach by any statute or doctrine of Texas. (Petitioners' Br. 11-12) "One breach is sufficient." (R. 203)

²⁰ The corporation did not own the vessel at the date of the endorsement of August 6, 1948, to which Petitioners refer.

fact that they stipulated at the trial that the vessel *was* pledged without Respondent's consent (R. 23-24) both courts below found that these repeated and stipulated pledges were a violation of the policy (R. 281, 19) and no question is presented as to the correctness of the finding. Petitioners' irrelevant assertion that admiralty does not recognize a common law mortgage is also inaccurate. Admiralty does in some circumstances recognize and enforce a common law mortgage on a vessel as between the parties thereto. *The Lottawanna*, 21 Wall. (88 U.S.) 558, 582.

Petitioners are in grave error in characterizing this as a policy of "inland marine insurance," as sufficiently indicated in the Brief of the learned *amicus curiae* (at page 4 and 11).

ARGUMENT.

I.

This Contract of Marine Insurance on the Hull of a Navigating Vessel Is a Maritime Contract, that Sprang From, and Is Governed by, the General Maritime Law Which Rules the Admiralty and Maritime Jurisdiction.

A general maritime law is very old. (Cf. Brief for *Amicus Curiae*.) Even in its primitive forms it alleviated somewhat the inconveniences of conflicting sovereignties, but had the difficulties attendant on maintaining any international law, and especially so, for a time, in England.

When the states ceased to be independent sovereigns the Constitution effecting their union did not leave maritime affairs in this country to the commerce clause. It made maritime affairs the subject of a separate and distinct grant as to "all matters of admiralty and maritime jurisdiction." This was not a duplication, but a unique solution of a unique aspect of the problems of union. *The Belfast*, 7 Wall. (74 U. S.) 624 (1868).

Whether a contract of marine insurance was a maritime contract and thus within the meaning of that grant was soon settled. The motive and policy of the Constitution to make independent states into one nation was, and is, too obvious to be overlooked in understanding a special grant of power to one national government in maritime affairs. And that prevailed—against English precedents then current as to the meaning of "admiralty" that had been mutilated by insistence of Whig Parliaments and Sir Edward Coke that the common law peculiar to England was the only "law" having any force in England.

The foregoing, occurring in more detail in the decisions of the judges of this and other Federal Courts, is developed in the decision of Mr. Justice Story in 1815, holding a contract of marine insurance to be a maritime contract. He concluded:

“At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.”

De Lovio v. Boit, 2 Gall. 398; F. C. No. 3,776 at 443

When the subject arose in this Court in 1870, this decision was approved in strong terms, as were other like decisions of the Federal Courts. *Insurance Co. v. Dunham*, 11 Wall. (78 U. S.) 1 (1870).²¹ The decision that a contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction of the United States was reiterated. The source, and substance, of the law of the marine contract of insurance was declared by this Court:

²¹ *Peel v. Merchants Ins. Co.*, F. Cas. No. 10,905 (1822); *Hale v. Washington Ins. Co.*, F. Cas. No. 5916 (1842); *Gloucester Ins. Co. v. Younger*, F. Cas. No. 5487 (1855).

"Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime and derives all its material rules and incidents therefrom."

(*Ibid*, 11 Wall. 1, 31)

We are unable to find any case to the contrary in the course of our national history. The doctrine appears to be uniform, down to and including *Compania etc. v. Archdale*, N. Y. Law Journal, June 28, 1954, p. 5, not yet officially reported. (Cf. the indices of "American Maritime Cases" for marine insurance.) Benedict's standard treatise on *Admiralty* states that the contract of marine insurance "is, indeed, of all contracts, the most purely maritime." (Sec. 110a, 6th ed., 1940).

In holding the contract of marine insurance to be a maritime contract this Court repeated that the grant of power to the Federal sovereign as to matters of admiralty and maritime jurisdiction extends "to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide." (*Ibid*, 11 Wall. 1, 25.)

General maritime law has been the means of relieving maritime transactions of the inconveniences incident to conflicts of independent sovereignty as to all matters of admiralty and maritime jurisdiction. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.

The separate and distinct provision of the Constitution was addressed to all matters of admiralty and maritime jurisdiction when the states ceased to be independent sovereigns, and the whole people created one national sovereign. Thenceforth one body of substantive law was the law of the nation as to the matters within its admiralty and mari-

time jurisdiction. This is the general maritime law as fashioned under Article III by the courts of the nation and thus, ultimately, this Court or as declared by Congress. *Pope & Talbot v. Hawk*, 346 U. S. 406, 409-411.

No question is made here as to what the general maritime law is as to any matter in controversy. (R. 280, 281 and auth. cit.) The question made here is whether the general maritime law of which this uniquely maritime contract is "part" and from which it derives "all its material rules and incidents," governs the validity and meaning of its terms. The only alternative suggested by Petitioners is that the validity and meaning of its terms shall be ruled by the laws of the several states, as before the Constitution.

The learned *amicus curiae* and the authorities mention the unusual degree of reliance placed on the assured in marine insurance transactions.²² Insurance in substantial sums in favor of strangers, on a transitory and distant subject matter, is characteristic of the field of marine insurance. The maritime law strictly applies a rule that warranties written in the policy to be performed by the assured, will be literally enforced. (R. 280, 281).

This vessel was in Mississippi about to start on a voyage of hundreds of miles; the assureds' agent McKinney had a place of business in Texas; H. H. Cleaveland Agency to whom he telephoned and wired was in Rock Island, Illinois, and the respondent insurer, to whom Cleaveland applied, was in Chicago.

On the day that Cleaveland's man, Rossow, saw Respondent at its office in Chicago (Dep. 17a) following a telephone call and a letter (Dep. 3a), he was able to wire

²² Cf. Brief of *Amicus Curiae*, pages 9 *et seq.*

McKinney that Respondent was binding the coverage to "full marine perils" (Dep. 17a).

Again, when the possibility of an endorsement increasing the amount of insurance by \$30,000 (from \$10,000 to \$40,000) was suggested in a letter to Cleaveland by McKinney, representing therein that assureds had an investment of \$40,000 in the vessel (Dep. 40a), Cleaveland's man Rossow secured authorization of a binder for that sum in a telephone conversation with Respondent on December 20, 1948 (Dep. 42a) by reading to Respondent McKinney's foregoing representation that assureds had a \$40,000 investment in the vessel; and, thus securing Respondent's consent, was able on the day of that conversation to wire McKinney: "Binding this amount" (Dep. 41a)—for which advices McKinney expressed his thanks and asked for an endorsement increasing the coverage of \$10,000 by \$30,000. (Dep. 44a).

This binder was confirmed to Cleaveland in writing on December 28th, with the suggestion to Cleaveland "that you request the assured (*sic*) to have a competent marine surveyor inspect the vessel, and send us a copy of the report together with the surveyor's estimate of its present day value," etc. (Dep. 46a) On January 18th, 1949, the signed endorsement was mailed by Respondent to Cleaveland increasing the amount of insurance to \$40,000 and asking again for a survey or application, referring to the previous request. (Dep. 50a) This endorsement, dated back to December 20 when Respondent agreed to it, as above, was signed by Cleaveland (R. 167, 168) and forwarded to McKinney, the same letter transmitting Respondent's request that assured "have a competent marine surveyor inspect the vessel and complete the attached application," etc. (Dep. 51a)

Thus this increase in the amount of insurance was effected, bound, confirmed, and embodied in endorsement retroactively effective, on the faith of the statement of a stranger representing assureds, as to the amount invested in a vessel then nearly a thousand miles away—while the underwriter waited for a copy of a survey desired in order to have assured get the estimate of a competent surveyor as to whether the \$40,000 investment had resulted in corresponding value.²³

²³ Petitioners say that afterwards on February 9, 1949, the “application and survey” which they print in the record was sent to Respondent. (Petitioners’ Brief 7) That document repeats the statement (no longer claimed to be true—Petitioners explained it in their Brief to the Court of Appeals as a “mistake”) of a total of \$40,000 cost (R. 190) and makes other false statements, e. g.: “Particulars of any mortgage or other encumbrance None.” (The vessel was in fact then pledged by successive chattel mortgages for a total indebtedness of \$28,000, none of which was paid.) (R. 24) Again: “Owner, Wilburn Brothers. Address: Denison Texas.” (The vessel was in fact then owned by Wilburn Boat Company, an Oklahoma corporation, not domesticated in Texas (R. 24, 25) whose office and principal place of business was Durant, Oklahoma.) (R. 48)

If this “application and survey” of February 9, 1949 came to the underwriters’ attention before the burning of the vessel, which occurred on February 25, 1949, it involved no waiver of the policy terms (R. 203) and no such question is presented. (Cf. Petition for Certiorari.) The statement in this belated survey which Petitioners describe as a disclosure that the vessel was “to be” used commercially (Petitioners’ Brief 7) was not a disclosure of the fact that the Wilburns had been using her for commercial purposes ever since they bought her and that the policy was void for that breach (R. 203) as well as for other breaches, as to which the “application and survey” made statements, as above, contrary to the facts as stipulated at the trial.

Fundamental to such situations is the fact that marine insurance on the hulls of navigating vessels, both as to the transaction and the subject matter to which it is addressed, typically involves a section of the map transcending the political boundaries of any single state. In an earlier case where this Texas "causation" statute (as Petitioners term it) was also argued to require the underwriter there to show, not only that the undertaking had been violated by the assured, but also that it caused the disaster, it was held:

"The policy covered the vessel on navigable waters of the United States without as well as within the state of Texas. It was a maritime contract, and therefore governed by the general admiralty law and not by the law of Texas."

Aetna Ins. Co. v. Houston Oil & Transport Co.,
49 F. (2d) 121, 124 (CA 5, 1931).

This Court denied certiorari in that case—284 U. S. 628.

Marine underwriters can rarely be in a position to show why vessels that navigate waters a thousand miles away founder, or are burned by fire in the small hours of the morning after being acquired for a commercial venture (that had, to say the least, not yet succeeded), that had been loaded with unpaid mortgages, and sold—all in violation of the warranties. But by the rule of the maritime law, the law "from which their contract springs" and "by which it is governed", they are entitled to strict enforcement of the terms of those warranties, and need show only that they were broken. (R. 202, 203) This rule is adapted to the nature and necessities of the maritime situations out of which it grew, and of which it is characteristic. (*Vide Supra*).

It is difficult to see how marine insurance could serve the necessities of honest vessel operation as it has long done in its great field under any other law than that from which it sprang.²⁴

When Congress adopted a model marine insurance law for the District of Columbia, it is significant that it did not change any of these rules of the maritime law.²⁵

Granted that as Petitioners say (Brief 25) there cannot be uniform "terms" of marine insurance policies such as various states have sought to legislate as to other forms of insurance, there can be, and there is, uniform maritime law as to the force, interpretation and validity of the warranties parties employ in policies of marine insurance. It is significant that Congress investigated marine insurance for three years and found no occasion to change the uniform general maritime law in its model marine insurance bill.

Granted, further, that as the powers of Congress were once understood under the *commerce* clause (cf. the doctrine of *Paul v. Virginia*, 8 Wall. (75 U. S.) 168, and *Hooper v. California*, 155 U. S. 648—the doctrine that was relied on by the Congressional witness Petitioners quote at page 24 of their Brief as they admit at Brief 25) Congress could not then do for the whole nation what its Model Marine Insurance Act did, viz., regulate the "business" of marine insurance.²⁶ The views of the witnesses that Petitioners

²⁴ Petitioners apparently contemplate that premiums will be increased. (Brief. p. 11)

²⁵ Nor was any change therein desired by the ship-owner witnesses or anyone else. Cf. references of Petitioners' Brief at page 25.

²⁶ This Act permitted marine insurers to write also other kinds of insurance contracts (apparently for that purpose including the artificial definition to which Petitioners at Brief 19 refer), provided for taxation on net premiums, etc. etc. 35 D. of Col. Code. §§ 1101-1133.

quote express no doubt that if Congress desired to make a change only in the maritime law, viz., the rules governing the force and interpretation of the maritime contract, it could have done so at any time and for the whole nation, provided only Congress did not seek to reintroduce the diversity of state control as to the rules of the maritime law that the admiralty clause was designed to end. *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 385-389 and auth. cit. (1924).

It will be apparent that the admiralty and maritime jurisdiction with respect to marine insurance is the substantive law of the maritime contract itself, the contract which "sprang from the law maritime and derives all its material rules and incidents therefrom,"—which is "part" of that maritime law "by which it is governed," as this Court has said. (*Insurance Company v. Dunham*, 11 Wall. (78 U. S.) 1, 30-35 (1870) *supra*.) The general maritime law does not govern (R. 205) what taxes marine insurers shall pay; nor whether they shall be individuals or corporations; nor the amount of their reserves; nor whether they shall also write other kinds of insurance; and whether such contracts, whose own substantive force and validity springs from and is governed by the maritime law, shall also be made available on humanitarian grounds to seamen on vessels that never leave the state where the contract was made, is another question not presented here.²⁷

But the construction and the validity of the terms that the parties employ in the maritime contract itself is a part of the general maritime law itself, from which law the contract sprang, from which it derives all its material rules, and by which it is governed.

²⁷ Cf. *Maryland Casualty Co. v. Cushing*, 347 U. S. 409; 98 L. Ed. 519; and see Record 205.)

Petitioners' argument to the first of the two points made in their brief begins with the proposition that: "Insurance Is Not Commerce." (Petitioners' Brief 13.) That indicates a confusion that becomes the substance of Petitioners' ensuing argument (as also pointed out in the brief of the learned *amicus curiae*, Point II, p. 19 *et seq.*)

Article I, Section 8 of the Constitution is separate and distinct from Article III, Section 2. Whether "Insurance is not commerce" under Article I, Section 8, the unique contract of marine insurance is a maritime contract under Article III, a contract that in all its material rules and incidents is derived from and governed by the general maritime law.

What Petitioners wish to suggest, as presently appears in their Brief, is that because all insurance was personal and local and thus beyond the Federal power under the commerce clause, as that clause was construed in *Paul v. Virginia*, 8 Wall. 168, it would be "inconsistent" to say that marine insurance is not similarly personal and local and thus beyond Federal power under the admiralty clause.

The primary answer to Petitioners' suggestion is not that *Paul v. Virginia* was recently held to have been mistaken (although that also is true) but that it was mistaken with respect to an entirely separate and distinct constitutional provision.

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connec-

tion with one another, and are conferred by the Constitution by separate and distinct grants. *The Genesee Chief*, 12 How. 452."

The Belfast, 7 Wall. 624, 640

See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160, 161, 163-164.

This contract of marine insurance is integral to the admiralty and maritime jurisdiction of the United States, deriving all its material rules and incidents from the general admiralty law "by which it is governed." That is an entirely different test and principle from any that can be stated under the commerce clause.

And it is on that test, and that principle, arising under the admiralty clause (and not existing under the commerce clause) that the laws of the several states are excluded from matters of "admiralty and maritime jurisdiction."

In *Watts v. Camors*, 115 U.S. 353, there was (p. 353) a "charter-party, made and concluded upon in * * * New Orleans," which provided for payment of the estimated freight if the charterer broke the contract. The maritime law and the law of Louisiana were directly in conflict as to that clause, Louisiana enforcing it strictly. This Court upheld the charterer's contention that (p. 359) "being a maritime contract, its construction was not affected by the local law of Louisiana."

This case among others was cited by this Court in *Union Fish Co. v. Erickson*, 248 U. S. 308, in holding that a maritime contract which was declared void by Section 1624 of

the California Civil Code, i. e., the *lex loci contractus*, would be enforced because it was a valid contract (p. 313) under the general maritime law.²⁸

In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, suit was on an ocean bill of lading issued in New York. It was held that state law was not controlling, and that the maritime law as adopted in this country governed the contract.

Petitioners' next position (Brief 14) in support of their first point is to put forward the "police power" of the states against the general maritime law. Their argument correctly recognizes that police power is the power to govern. Accordingly, the next step in their argument is: "Since a national bill regulating marine insurance would be unconstitutional this would be equivalent to granting to marine insurance companies a blanket license to operate without legal restraint." (Brief, 15) Petitioners seem to

²⁸ At page 16, note 13, Petitioners state that "the State of California attempted to legislate in a field already taken over by Federal legislation. To-wit: laws relating to seamen contracts," etc. The contract in question was for the services of a master; no seamen's legislation was mentioned in the opinion or the briefs of counsel. The ground of decision was stated as follows:

"If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed."

Union Fish Co. v. Erickson, 248 U. S. 308, 314.

The "field has been occupied" under the Constitution itself, by the general maritime law. See *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 161.

overlook the decisions of this Court holding that Congress can legislate under the admiralty clause to change the general maritime law of the nation—authorities which recognize, also, Congress cannot revive the diversity of state control. *Panama R.R. Co. v. Johnson*, 264 U. S. 375, 385-389 and *cas. cit.*

Petitioners again overlook that when Congress did pass a Model Marine Insurance Act, it found no occasion to change the ordinary rules of the maritime law respecting the meaning and force of warranty terms in a policy of marine insurance as established by the general maritime law, but only to regulate the "business." (*Vide supra*)

Petitioners then assert (Brief 15) that codification is essential because of the complexity of the marine insurance "business," and that "available defenses" must by necessity be handled by the legislative branch of the "State" governments, etc. We presume that by "defenses" they mean those arising by the terms and construction of the marine insurance contract which derives all its essential rules and incidents from the general maritime law. They do not explain why the States alone are competent to change the general maritime law. Congress can change the general maritime law, subject to the qualification imposed by the very purpose of the grant that it shall not revive the diversity of state control as to matters of admiralty and maritime jurisdiction. (*Auth. cit.*) But when Congress did enact a model insurance bill, in the avowed hope that the legislative branches of the various state governments would also adopt it, the "available defenses," as the maritime law had established them, were left unchanged.

Petitioners then refer to the *Jensen* line of cases. First they quote the isolated sentence from *Standard Dredging Co. v. Murphy*, 319 U. S. 306, 309: "Indeed, the *Jensen*

case has already been severely limited, and has no vitality beyond that which may continue as to State workman's compensation laws." They omit the context supplied by that and subsequent opinions.

The next paragraph of the *Standard Dredging Co.* case states: "But in dealing with *unemployment* insurance, 'exclusive federal jurisdiction' is not affected at all. Congress retains power to act in the field, and in the meantime the federal courts have nothing to do with it." (Our emphasis) (*Idem.* 309-310) This statement is not true of *marine* insurance contracts, which are distinctively maritime contracts. And the subsequent judicial history of the sentence Petitioners select for quotation is interesting.

Reading the dictum Petitioners quote, as above, from the *Standard Dredging Co.* case, the learned Court of Appeals for the Second Circuit—while it did not go to the literal extreme of supposing that the several states were now free to substitute their own law for the general maritime law in all but workmen's compensation cases—fell into the error of saying in *Guerrini v. U. S.*, 167 F. (2d) 352, that whether the maritime or state law applies "depends on the forum"; an error which it retracted at the first opportunity in *Hedger Transp. Co. v. United Fruit Co.*, 198 F.(2d) 376 (CA 2), on the authority of *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, *Intagliata v. Ship-owners etc. Co.*, 26 Cal. (2d) 305; 159 P. (2d) 1 (holding that the substantive maritime law governs a cause of action falling within the admiralty and maritime jurisdiction, whether the remedy thereon is sought in a State or a Federal Court); *Colonna Shipyard v. Bland*, 150 Va. 349; 143 S.E. 729; 59 A.L.R. 497 (a similar holding, cited by this Court in the *Garrett* case); and *Jansson v. Swedish American Line*, 185 F. (2d) 212 (CA 1) (a learned and brilliant analysis of the decisions by the Chief Justice of the Court of Appeals for the First Circuit).

Further, the Court of Appeals for the Third Circuit rejected any such interpretation of the dictum of the *Standard Dredging Co.* case as its isolated quotation first suggested to the Court of Appeals for the Second Circuit, as above. *Hawn v. Pope & Talbot, Inc.*, 198 F. (2d) 800 (CA 3). The latter case came to this Court. Petitioners make no reference thereto.

In that case (*Pope & Talbot v. Hawn*, 346 U. S. 406) this Court, rejecting the argument "that Hawn's rights must be determined by the law of Pennsylvania" because he was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law," pointed out that "his right of recovery * * * is rooted in federal maritime law." On that basis it was held (pp. 409-410):

"Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. See e. g., *Garrett v. Moore-McCormack Co.* 317 U. S. 239, 243-264, and cases there cited."

This Court again (pp. 410-411) emphatically rejected the fallacious suggestion that *Erie R.R. v. Tompkins*, 304 U. S. 64, would require the application of state law to a maritime cause of action if the remedy for the substantive maritime right were sought in a state court (a fallacy fully exposed in the *Garrett* case (317 U.S. at 245))²⁹ pointing out also that the substantive law applied in matters of ad-

²⁹ "The source of the governing law applied is in the national, not the state government." *Garrett v. Moore McCormack Co.*, 317 U. S. 239, 245.

miralty and maritime jurisdiction is "not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket." (346 U. S. on 411)

When it is remembered that this Court has held that the contract of marine insurance "sprang from" the general maritime law, is "part" of that law, deriving "all its material rules and incidents" from that law, "by which it is governed" (*Ins. Co. v. Dunham*, 11 Wall. 1, 30-35, *supra*) it seems plain that Respondent's rights under that contract are deeply rooted in the admiralty law and that under the rulings of this Court, reiterated in the *Hawn* case, Respondent's right to rely on that law as the law of the contract cannot be gainsaid.

Petitioners' further suggestion that a contract of marine insurance is "personal and local" has been commented upon. It remains to say that Petitioners' suggestion is not that this contract of marine insurance was local, but that all contracts of insurance, as such, are personal and local, because insurance was not commerce under *Paul v. Virginia*, *supra*. Apparently they recognize that unless all insurance, by nature, is local, then this contract cannot be so described. It was insurance on the hull of a vessel in a Mississippi port when the insurance was wanted, issued by an insurer in Illinois, in favor of assureds located elsewhere, and covering the vessel against navigating perils and full marine risks while it voyaged the navigable waters of the United States in five states. That was not of merely "local concern" in any sense relevant to the admiralty clause of the Federal Constitution, nor in any other sense. Petitioners do not even argue that it was of purely local concern, except on the premise that all insurance is so by nature, citing the irrelevant (and rejected) doctrine of *Paul v. Virginia*.

Petitioners' suggestion (Brief 19) that they were "grocers" and therefore may be presumed to know the law of Texas does not seem persuasive. Whatever they knew (and they did know that they were insuring a navigating vessel, and that they had the services of their insurance man, McKinney), both parties have a right to contract with reference to the law that governs their transaction. Under the decisions of this Court and the other federal courts, this was a maritime contract governed by the general admiralty law. Its face, terms, subject matter and circumstances alike disclose that it was made with reference to that law. "The parties must be presumed to have had in contemplation the system of maritime law under which it was made. *Watts v. Camors*, 115 U. S. 353, 362; *Union Fish Co. v. Erickson*, 248 U. S. 308, 313.

The artificial statutory definition of marine insurance quoted by Petitioners (Brief 19) was adopted for the special purposes of that Act and does not change the meaning of marine insurance as a maritime contract in the Constitutional sense. (Nor could it. *Panama R.R. Co. v. Johnson*, 264 U.S. 375)

The suggestion (Petitioners' Brief 20, 21) that a warranty in a marine contract of insurance against pledging a vessel is not to be governed by the maritime law if the vessel is pledged only by a common law method, seems confused. The maritime contract is that it shall not be pledged; that maritime undertaking would appear to be violated, however the vessel is pledged. (It is stipulated here that this vessel was pledged. R. 23, 24) It is the obligation of the maritime contract that is the subject of the maritime law. (Incidentally, a court of admiralty

will under some circumstances distribute the proceeds of the sale of a vessel to a chattel mortgagee. *The Lottawanna*, 21 Wall. 558, on 583.

The suggestion (Petitioners' Brief 20) that violation of the warranty in a maritime contract of marine insurance as to how the vessel shall be used involves "as much of a characteristic of common law as of admiralty law" exposes Petitioners' position. The insurance contract itself is maritime and that is enough. Further, if the type of use of a vessel on navigable waters of the United States is no concern of maritime law it is difficult to see how anything is.

It will be recognized (although Petitioners fail to state the fact) that the quotation appearing at page 21 of their brief is from a dissenting opinion. The general maritime law is now well-recognized as the articulate voice of the Federal Sovereign, speaking by its legislative or judicial voice. (*Pope & Talbot Inc. v. Hawn*, 346 U.S. 406, 409-411.)

II.

Application of Texas Law as Put Forward and Claimed by Petitioners to Affect the Validity and Effect of This Contract of Marine Insurance, Would Deprive Respondent of Its Constitutional Right to Rely and Depend on the Terms of the Contract According to Their Validity and Effect Under the Substantive General Maritime Law.

The Texas statutes referred to are hereinbefore set out. Two of them are conveniently treated together.

The first (relied on by Petitioners at Brief 13) provides in substance that any contract of insurance payable to any "inhabitant" of Texas and issued by any company "doing business in Texas" shall be governed by its law.

The second (relied on by Petitioners at Brief 10) is argued to invalidate the provision of the policy that it shall be void if the vessel is pledged.

We have heretofore pointed out the peculiar moral risks involved in underwriting marine insurance. We suppose it is evident that in underwriting marine insurance, which is characteristically for substantial sums in favor of strangers on a distant and transitory subject matter, the moral risks are peculiarly great. (Cf. Brief of the learned *amicus curiae*.)

Provisions against encumbering the insured property go to moral risk. (*Sun Insurance Office v. Scott*, 284 U. S. 177 (1931).) The marine underwriter is peculiarly in need of their protection.

According to Petitioners, Texas has said (and validly may say) that such provisions in a maritime contract, forbidding pledge of the vessel—however valid and enforceable against anyone else—shall be void as against any payee who may inhabit Texas. But moral risk is not a matter that varies with habitation.

This maritime contract sprang from the general maritime law—deriving all its essential rules and incidents therefrom; the right arising on that maritime contract under the maritime law was to rely on it as it was written. (See Point I hereof and Brief of *Amicus Curiae*.) The blunt question is whether a state can, by its law, take away that substantive right, deeply rooted in the maritime law. We submit that under Article III, Section 2 of the Constitution, it cannot, and that the repeated decisions of this Court so hold. Among many such cases, see especially: *Pope & Talbot, Inc. v. Hawk*, 346 U. S. 406, 409-411 and *auth. cit.*; *Watts v. Camors*, 115 U. S. 353, 359; *Union Fish*

Co. v. Erickson, 248 U. S. 308, 313; *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 443; *Ins. Co. v. Dunham*, 11 Wall. 1, 30.³⁰

Petitioners do not attack the terms of the policy that forbid pledge of the vessel under other Texas laws.

The provision of the policy that the vessel should be used solely for private pleasure purposes was equally a part of this marine policy, a contract derived from and governed by the general maritime law in all its material rules and incidents, as this Court describes it. (See Point I.)

Petitioners agree they violated that term of this policy.

This was a provision contemplating performance by the assureds as to use of a vessel on the navigable waters of the United States in five states. It was a distinctively maritime obligation in every sense.

The right of this Respondent under the maritime law by which a contract of marine insurance is governed is to stand on the plain terms of the contract as they were written, to defend for the breach of those terms. (Point I.)

³⁰ Presumably the absence of any argument that the Texas "causation" statute applies to this provision of the contract arises from Petitioners' recognition that the "causation" statute does not apply to such a breach since, as the leading Texas case puts it (*Home Ins. Co. v. Henderson*, 263 S. W. 650, 652; Tex. Civ. App.), the pledge of the vessel could not "of itself" cause the vessel to sink. Cf. *National Fire Ins. Co. v. Carter*, 237 S. W. 289 (Tex. Com. App.), and *Citizens State Bank v. American Fire & Casualty Co.*, 198 F. 2d 57, 59 and auth. cit.

Petitioners say that Texas can take away that right, by imposing on the Respondent the burden of proving something more, namely, that the admitted violation caused the loss.

No doubt commercial use might in some circumstances cause the loss "of itself." (Cf. n. 30, *supra*.) It is also true, as the *amicus curiae* points out, that the higher risk from commercial use is both physical and moral. (Br. 14.) This acquires point here from the circumstance that this vessel, purchased as a commercial venture (R. 68), had performed only a few such trips in all the time intervening before the loss. (R. 62.) After the loss when the facts came out, it appeared as a venture having "every prospect of failure." (R. 188.)

The rule of the state statute relied on by Petitioners as to this breach is that "Texas enacted a statute requiring the insurance company to prove that the breach of warranty contributed to the loss." (Petitioners' Brief 11.)

That state statute would take away the Respondent's right under the general maritime law to defend on the plain terms of the maritime contract as they were written therein. More, it would do so by requiring that an additional fact should be shown (a fact peculiarly difficult to show with respect to sunken vessels) and impose on Respondent the burden of proving it.

This would seem to go altogether beyond the attempted state change in the maritime law condemned by this Court in *Garrett v. Moore-McCormack Co.*, 317 U. S. 329. In that case a seaman brought suit which was defended on the ground he had given a release of his asserted maritime claim. The maritime law required the party claiming the benefit of the release to sustain the burden of the issue of its fairness; the state law put the burden of that

issue on the other party. The suit was litigated through the courts of the state which applied the state law as to the burden of proof. This Court granted certiorari and reversed for failure to apply the maritime rule as to the burden of proof, holding that rule to be part of the substantive maritime right and beyond the power of the state to change because of the requirement of national uniformity in enforcing rights rooted in the maritime law. (*Ibid.*, 317 U. S. on 244 and cas. there cit. no. 10.)

The right of a party to a contract of marine insurance to defend on its terms is a substantive right. The contract is a maritime contract, if any is. (Point I.) Substantive rights of defense arising on such a contract are deeply rooted in the general maritime law. The state law here attempts to change the substantive right arising under the maritime law on the maritime contract, and require a party thereto to show a fact that is irrelevant to its obligation under the general maritime law, and bear the burden of proving it. That appears clearly to be a more extreme invasion and alteration of the rights arising on the substantive maritime law than that condemned in the *Garrett* case. It is a deprivation of constitutional right under Article III, Section 2. (*Ibid.*, 317 U. S. on 244 and cas. there cit. n. 10, 245, 246.)

In the *Garrett* case, just cited, reliance was on the cases in the *Jensen* line to support the ultimate *ratio decidendi*, stated as follows (317 U. S. on 244):

“In many other cases this Court has declared the necessary dominance of admiralty principles in vindication of rights arising from admiralty law.”

Rights on maritime contracts evidently arise under the general maritime law; the law of the state *loci contractus*

is repeatedly held not to define their validity and effect, as the authorities already cited have shown. It was not the law of Louisiana, but the general maritime law, that controlled the validity and effect of the contract in the *Watts* case, because it was a maritime contract (115 U. S. 353, 359, *supra*). It was not the statutory law of California where the contract was made that controlled the validity and effect of the contract in the *Erickson* case; it was a maritime contract, as to which the Constitution contemplates uniformity of one national law, beyond the power of states to impair by their diverse laws. (248 U. S. 308, 313-314, *supra*.)

In the *Garrett* case, to make the matter plain, this Court added a note to its basic statement of the necessary dominance of admiralty principles in rights arising from the admiralty law, saying (317 U. S. on 244-245 n. 10):

“Disagreement over the Constitutional issues in the *Jensen* line has not extended to this principle. Cf. *The Lottawanna*, 21 Wall. 558, 575; *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 43.”

In the *Jensen* case so referred to, the maritime contract was one of employment. The *Jensen* case dealt with the consequences arising from that maritime contract under the maritime law, as pointed out by *Schuede v. Zenith S. S. Co.*, 216 Fed. 566, a case approvingly cited by this Court in the same note with *Jensen* in the *Garrett* case. (317 U. S. on 244-245, n. 10, *supra*.) In the *Jensen* case and other cases in the *Jensen* line there cited to “this principle” the obligation enforced, arising on a maritime contract, was not governed by the statutory law of the state where it was made or performed, but by the general maritime law.

In *Detroit Trust Co. v. The Thomas Barlam*, 293 U. S. 21, 43, referred to as above by the *Garrett* case, this Court said by Mr. Chief Justice Hughes, referring to the admiralty and maritime provision of Article III, Sec. 2:

“But the grant presupposed a ‘general system of maritime law’ which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation. *The Lottawanna*, 21 Wall. 558, 575.”

In the *Hawn* case, *supra*, (346 U. S. 406 at 409) this Court stressed that the right of recovery was “rooted in federal maritime law.” A right of recovery or defense on a maritime contract, a contract that sprang from the law maritime and derives all its material rules and incidents from the maritime law by which is governed (*Ins. Co. v. Dunham*, 11 Wall. 1, 30, *et seq.*, *supra*) is, indeed, “rooted in federal maritime law.”

Petitioners' Brief is convincing that there is no substantial reply to the foregoing. They inquire (Petitioners' Brief 20) “If the laws of the 48 States relating to marine insurance are not uniform what will happen to uniformity when the various Federal Judges in this country rule on a marine policy and attempt to allocate common law and maritime law to an insurance contract in order to determine whether or not State insurance statutes are applicable.” That is a good question.

Petitioners here present an aspect of the problem to which the constitutional solution is addressed. Under the authorities referred to, the constitutional solution is the government of maritime contracts by one general maritime law, a substantive national law, that states cannot change. That this is the Constitution's answer to the problem that

Petitioners recognize as above quoted, appears evident from the decisions of this Court to which we have referred. Petitioners' question does not answer those decisions. It convincingly suggests the reason for them; the reason they themselves announce.

The fact that there is no substantial alternative to the Constitution's answer to Petitioners' problem, as that answer has been reiterated by the decisions of this Court, is emphasized again by the different answer which Petitioners seem to suggest. "We are not dealing here," they say, "with the construction of a perils of the seas clause, or an Inchmaree clause, or a marine watchman clause (citing *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 49 F. 2d 121, Cert. Den. 284 U. S. 628) but rather with the validity of State insurance statutes regulating defenses that an admitted foreign (*sic*) insurance company cannot use in order to escape contractual liability." (Cf. *Claflin v. Houseman, Assignee*, 93 U. S. 130, 137, as cited by the *Garrett* case, 317 U. S. at 246, n. 14.) This seems to mean (and especially in conjunction with the citation of the *Aetna Ins. Co.* case) that certain parts of an admittedly maritime contract of marine insurance should be governed by the general maritime law, and other parts by the laws of the several states.

No doubt Petitioners' purpose is to suggest that, in the case put at Petitioners' Brief, p. 20, of one policy covering one shipment by land and water, the solution of the Constitution is imperfect. The Constitution enables the parties themselves to avoid the troubles Petitioners imagine by a separate contract appropriate to the maritime voyage. But the parties themselves cannot achieve uniformity in the law governing the maritime contract.

Petitioners elsewhere suggest that the rule of strict compliance with warranty terms is as characteristic of the "common law" as it is of the maritime law. This would appear to assume that nothing characterizing both the "common law" and the maritime law, is characteristic of either, which would not be true in any event. The assumption seems, also, to ignore more fundamental matters. In a famous phrase quoted by them (but not in connection with the assumption referred to) the "common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign." (Petitioners' Brief, 21) The "common law" in this country is the judicial voices of 48 different state sovereigns. If they were all, at some lucky moment, to hit exactly the same note, and that the note of the maritime law, the maritime law would not thereby lose its identity at that point of the scale. This Court's discussion of *Erie R. R. v. Tompkins*, 304 U. S. 64, occurring at page 245 of the opinion in the *Garrett* case (317 U. S. at 245) would seem to make it plain that the decisive question is: what sovereign is the source of the substantive general maritime law that governs matters of admiralty and maritime jurisdiction—the national sovereign, or 48 state sovereigns? The *Garrett* case itself, and the *Hawn* case that reaffirmed it (346 U. S. at 409, 410), (and the "principle" of the decisions to which they adhere) would seem to have settled it that the substantive general maritime law is the articulate voice of the federal sovereign.

Petitioners' remaining suggestion is that Respondent "agreed" to be bound by the laws of Texas. This is completely answered by the authorities cited and discussed in the brief of the learned *amicus curiae*, pages 38-41, which we need not repeat here. The position there taken is correct. See *Hanover Inc. Co. v. Harding*, 272 U.S. 494, 507-8, 514, 517.

We need only add that it is correct even on the assumption that Respondent was authorized to do business in Texas (which does not appear); and *a fortiori* correct on the actual record.

III.

The McCarran Act Does Not Authorize States to Supersede the General Maritime Law as to the Force and Validity of the Terms of Marine Insurance Contracts, but Was Passed for a Particular and Different Purpose Disclosed by Its Terms and Legislative History. Interpreted and Applied as Petitioners Seek to Interpret and Apply it Here, as a Permission to the States to Revive the Diversity of State Control in the Substantive Admiralty and Maritime Jurisdiction, It Would Defeat the Purpose of Article III, Sec. 2, and Exceed the Powers of Congress.

That the McCarran Act does not and was not intended to have the effect for which Petitioners contend, is shown by the brief of the learned *amicus curiae*, at pages 31-38. We also discussed the matter in our Brief on Reply to the Petition, at pages 32 and following. To save reprinting we refer to the two discussions mentioned. It would pervert the intention of Congress to apply the McCarran Act as Petitioners propose.

Further, in that application the McCarran Act would clearly exceed the power of Congress, (a consideration material also to its interpretation). We refer again to the dis- in this connection. Among many authorities there cited: *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, and *cas. cit.*; *Panama RR. Co. v. Johnson*, 264 U.S. 375 and *cas. cit.*.

IV.

By the Law of Texas, Petitioners Could Not Recover Thereunder in View of All Their Breaches.

The common law of Texas in event of violation of the warranty terms of an insurance policy denies recovery thereon, irrespective of any causal relation between the breach and the loss. *Fidelity Mutual Life Assn. v. Harris*, 94 Texas 25; 57 S. W. 635.

Petitioners admit that the purpose of the Texas "causation statute" was to alter that rule, as stated in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452 (Petitioners' Brief, 11).

The statute (Petitioners' Brief 4, entitled "Texas Laws Govern Policies") applies by its terms only to "any contract of insurance payable * * * by any insurance company or corporation doing business in this State," etc.

The record does not show that Respondent was such a company or corporation.

The further statute, relied on by Petitioners as invalidating the anti-pledge provision of this policy, applies by its terms only to "Any provision in any policy of insurance issued by any company subject to the provisions of this law," etc. (Petitioners' Brief 4.)

Petitioners have not been made to appear to be subject to the provisions of that law.

The companies subject to that law are defined by it in a preceding section thereof so as to exclude this Respondent and the policy in question. (Cf. *supra* herein, Statutes, Texas Statutes Sec. 4880.)

Said law in the said defining section thereof, by its terms limits the application of that law to companies holding certificate of authority to transact business in Texas, and it does not appear that Respondent was such a company. Further, the last said section limits the application of law on which Petitioners rely to companies holding such certificate and the imposition thereon of supposed agreement as to the transaction of business "in" Texas. It does not appear that this company transacted business in Texas. The defining section of said law in the portion thereof beginning "it being extended" excludes the instant situation under the rule *expressio unius* (and was clearly an acknowledgment of the doctrine of *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 49 F. (2d) 121 (CA 5); cert. den. 284 U. S. 628).

The defining section of the law limits it further to companies issuing a policy or contract of insurance "against loss by fire on property within the state."

Texas itself would not allow recovery in view of the admitted breach in selling the vessel. *Citizens State Bank v. American Fire & Casualty Co.*, 198 F. 2d 57, 59 (CA 5); *National Fire Ins. Co. v. Carter* (Tex. Com. App.) 237 S. W. 1089; *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 57 S. W. 635; *Bosemman v. Ins. Co.*, 301 U. S. 196, 206; *Hartford Fire Ins. Co. v. Walker*, 94 Tex. 473, 61 S. W. 711; *Retailers Fire Ins. Co. v. Jackson Gin Co.* (Texas Civ. App.) 10 S. W. (2d) 799.

Moreover, Texas itself would refer this contract to the law of Illinois. *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 57 S. W. 635; *Washington Ins. Co. v. Shaw*, 180 S. W. 2d 1003, 1004 (Tex. Civ. App.); *Metropolitan Life Ins. v. Greene*, 93 S. W. 2d 1241, 1245 (Tex. Civ. App.).

V.

To Subject Respondent to the Texas Statutes Relied on By Petitioners Would Deprive Respondent of Its Rights Under the Due Process Provision of the Constitution, Article XIV, Amendments, Not To Be Subject to Extra-Territorial Operation of the Laws of Texas to Govern the Validity or Effect of the Transaction in Question.

Nothing appears that would warrant Texas in subjecting this transaction to its law, under the XIVth Amendment.

The vessel was in Texas, from time to time. Her presence there was transitory; it consisted of voyages over the state line from Oklahoma (R. 82) and presence in Texas for the temporary purpose of outfit or repair. (R. 70, 71) She was in Mississippi when the Wilburns bought her.

The policy permitted and contemplated the vessel's presence to some extent in Texas, for Lake Texoma lies in both Texas and Oklahoma, but more in Oklahoma. (R. 108) And the policy permitted and contemplated a voyage from Greenville, the water route traversing parts of Mississippi, Louisiana, Arkansas and Oklahoma. The regular berth of the vessel was Oklahoma. (R. 81) The policy covered her against loss by perils of the seas and other named perils in any part of the permitted waters. (R. 173) She was burned and sank in Oklahoma.

The policy ran to Frank and Henry Wilburn, d/b/a Wilburn Brothers, Denison, Texas. (R. 165) At that time Glen Wilburn was a co-owner. (R. 23) The record does not show where he lived, or "inhabited," at any time before the loss. Effective August 6, 1948, the policy was

amended; the business address previously shown in connection with Frank and Henry Wilburn was eliminated, and the policy made payable to "Glen, Frank and Henry Wilburn d/b/a Wilburns Boat Company," no address being shown. (R. 165)

The documents were negotiated, underwritten, bound, issued and delivered, in the State of Illinois as earlier herein described.

The premiums were paid by checks drawn to the order of H. H. Cleaveland Agency (R. 197, 198) of Illinois. (R. 80) They were not paid to McKinney. (R. 197) The said checks were handed to him. (R. 89)

The policy named three offices of the company—San Francisco, Chicago (R. 185) and New York (R. 183). The assured warranted to make reports of loss "to the nearest office of the Company or the agent who shall have issued this Policy". (R. 176) The issuing agent who countersigned the policy and the endorsements was H. H. Cleaveland Agency of Rock Island. (R. 185)

There was a warranty of private pleasure use (R. 173) (which would require performance wherever the vessel went.)

In *Hartford Accident & Indemnity Co. v. Delta Co.*, 292 U. S. 143, a Connecticut corporation insured a Mississippi corporation against loss by dishonesty of an employee of the Mississippi assured "in any position anywhere." The contract was made in Tennessee where both insurer, assured, and the employee, were present. Both the insurer and the assured did business in Mississippi. The employee committed defalcations in Mississippi. A policy condition requiring claim in 15 months from the end of the suretyship was violated; nevertheless, Mississippi allowed re-

covery on the policy on the ground that the condition was contrary to the public policy of Mississippi. It was valid by the law of Tennessee where the contract was made.

Rejecting the argument that the presence of assured in Mississippi when the claim matured and where, it was therefore argued, the payment ought to be made, together with the fact of loss in Mississippi (and that both insurer and assured were doing business there), this Court held that Mississippi could not excuse performance of a condition of the policy by its law, and that the law of Tennessee, the *lex locus contractus*, applied, whereby the violated condition was valid. Pointing out that "performance at most involved only the casual payment of money in Mississippi" (292 U. S. 159) this Court noted further that the liability, which was for the payment of money only, "was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship." (*Idem*, 149) The Court then said:

"It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of the loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not."

See, also, *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434-435; *Hanover Ins. Co. v. Harding*, 272 U. S. 494, 507-508, 514, 517.

(This contract was clearly valid in Illinois and Petitioners admitted breaches were clearly fatal under its law. See

Illinois Insurance Code as quoted under "Statutes," *supra*, and *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334; 68 N. E. 551, *supra*.)

The breaches were stipulated, and found by both courts; the judgment was dismissal. If there were no such thing as a general maritime law, the law of Texas could not be applied to excuse the stipulated breaches of this contract, without depriving Respondent of due process and transgressing the restraint which due process imposes on Texas under the XIVth Amendment. Petitioners have shown no applicable law under which the judgment is wrong. Every presumption is in favor of the judgment. *Bagnell v. Broderick*, 38 U. S. 436, 446 (1839); *Townsend v. Jamison*, 48 U. S. 706, 724 (1849).

The argument on the XIVth Amendment was made below but not passed on because other matters were decisive and controlling (R. 279). It is available here in support of the judgment. *Langues v. Green*, 282 U. S. 531, 538-539.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit affirming the judgment of dismissal entered by the District Court should be affirmed.

Respectfully submitted,

EDWARD B. HAYES,

*Attorney for Respondent,
Fireman's Fund Insurance
Company.*

EDWARD B. HAYES,
135 South La Salle Street,
Chicago 3, Illinois

IN THE
Supreme Court of the United States

OCTOBER TERM, A.D. 1954.

No. 7

WILBURN BOAT COMPANY, et al.,
Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

APPENDIX

Plaintiff's Exhibit 4 (R. 95, 97)

DEPOSITIONS OF

F. B. WHITE
and
E. H. ROSSOW

Rulings of the trial court excluding certain parts of these depositions and limiting others are found at R. 112 to 122, inclusive, as follows:

Deposition Exhibit	Record Page Where Ruling Appears
ROSSOW'S EXHIBIT 37	113
ROSSOW'S EXHIBIT 39	115
ROSSOW'S EXHIBIT 41	116
ROSSOW'S EXHIBIT 47	120
ROSSOW'S EXHIBIT 49	122

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Texas

Sherman Division

DEPOSITION

of

F. B. WHITE

Deposition taken on Friday, December 23, A. D. 1949, in the office of the H. H. Cleaveland Agency, 1800—Third Avenue, Rock Island, Illinois, before Arno N. Bufe, Notary Public in and for Rock Island County, Illinois.

[Tr. 2] F. B. WHITE, called as a witness, having been first duly sworn, testified as follows:

Direct Examination by Arno N. Bufe.

Interrogatory 1. State your name? A. F. B. White.

Interrogatory 2. State your residence? A. Rock Island, Illinois.

Interrogatory 3. What is your business or profession? A. Insurance.

Interrogatory 4. About how long has that been your business or profession? Since 1928.

Interrogatory 5. Referring to the years 1947, 1948 and 1949, what was your business connection, if any, with H. H. Cleaveland Agency? A. A partner.

Interrogatory 6. In the years 1947, 1948 or 1949, or prior thereto, was there a J. B. White connected with H. H. Cleaveland Agency? A. I would say no, because the agency has been in existence for over 80 years, and I have been a member of the Agency since 1928, and since that time there never was anybody of that name in the organization.

[Ti. 3] Interrogatory 7. In the years 1947, 1948 or 1949, was there anyone with the surname "White" connected with the H. H. Cleaveland Agency except yourself? A. No.

Interrogatory 8. Where was the place of business of H. H. Cleaveland Agency in 1947, 1948 and 1949? A. Safety Building, first floor, Third Avenue and Eighteenth Street, Rock Island, Illinois.

Interrogatory 9. State the nature of the business of H. H. Cleaveland Agency? A. Insurance only.

Interrogatory 10. Was that the nature of its business in 1947, 1948 and 1949? A. Insurance as agents only, as it has always been.

Interrogatory 11. In the years mentioned who was there connected with the H. H. Cleaveland Agency who handled wet marine insurance, if anyone? A. Mr. E. H. Rossow and myself were the only ones who handled wet marine insurance.

Interrogatory 12. In those years, 1947, 1948, and 1949, was there anyone else connected with the H. H. Cleaveland Agency who handled, attempted to handle, or had any authority to handle, wet marine insurance? A. Only Mr. Rossow and myself, or Mr. Cleaveland would have, perhaps, had the authority, but he has not been active in the Agency for some years, including the years mentioned.

Interrogatory 13. Who owned the boat "Wanderer" before it was bought by some people named "Wilburn" in June of 1948? A. Robert Marshall and John Shuler were co-owners.

[Tr. 4] Interrogatory 14. What, if anything, was done in connection with the insurance, if any, on the boat "Wanderer," in connection with the transfer of the boat to the Wilburns? A. The insurance that Marshall and Sauler had was transferred to the Wilburns.

Interrogatory 15. If your answer to the next preceding interrogatory is that something was done, state the facts about it? A. On June 4, 1948, I received a long distance telephone call from a Mr. McKinney who gave his address as 307—West Woodard, Dennison, Texas, who informed me that he was an insurance agent in Dennison, Texas, and acting as agent for the Wilburn Brothers who had purchased the Wanderer. He advised me their names were Frank and Henry, co-partners. I have that notation on a carbon of a letter dated May 27, 1948, which was written before this telephone conversation about the insurance when Marshall and Shuler were the insureds. During the course of the conversation, McKinney told me that he had no facilities for writing hull coverage, being located where he was, and wondered if I could arrange with our present carrier to continue this coverage while the Wanderer was being moved down the Mississippi from Greenville up the Red River to the Dennison Dam at Dennison, Texas, and locked through there to Lake Texoma. At the mention of Red River, I told him that I would have to have the authorization from our carrier and would he give me all the information pertaining to this risk so that I might in turn inform our carrier. [Tr. 5] In my letter of June 4, 1948, to the Fireman's Fund Insurance Company, which was our carrier, I outlined the plans, and in this telephone conversation Mr. McKinney told me it was their plan to take the Wanderer down the Mississippi River from Greenville and up the Red River and lock it through the Dennison Dam and use the boat exclusively on Lake Texoma. He advised me further that the Red River was a navigable stream up to this point, because they were letting more than enough water through for power purposes at the Dennison Dam. He asked me to contact our carrier, which I assured him I would and did immediately do so and confirmed it with a letter of the same date.

Interrogatory 16. What kind of a boat was the "Wanderer"? A. It was a pleasure boat, a stern-wheel, house boat.

Interrogatory 17. Was the "Wanderer" built for any particular use? A. It was built for Robert Marshall for pleasure use on the river.

Interrogatory 18. If your answer is in the affirmative to the next preceding interrogatory, for what use was the "Wanderer" built? A. I believe I answered this question with the answer in 17. The answer is the same—for pleasure use only.

Interrogatory 19. To what use was the "Wanderer" put, by those from whom the Wilburns bought her? A. Cruising on the Mississippi River—for pleasure purposes. [Tr. 6] Interrogatory 20. I show you a document of several pages that has been marked D-2-A through D-2-Q. Please identify it if you can. A. I have looked at the document mentioned in this question marked D-2-A through D-2-Q and note that it is a photostatic reproduction of policy Number YA 28579 of the Yacht "A" Form of Coverage issued by the Fireman's Fund Insurance Company, together with the endorsements covering the yacht Wanderer, with the exception of document D-2-D, which is a reproduction of a letter from our office referring to change-over of power in the yacht, that was sent out by one of our clerks under our direction.

Interrogatory 21. Is the page marked D-2-D ever part of any policy of insurance? A. Never.

Interrogatory 22. Do you know how the page marked D-2-D got attached to the rest of the document you have identified? A. No.

Interrogatory 23. Directing your attention to the document D-2-A through Q (except D-2-D) it seems to be a

policy of insurance, with numerous riders attached. Excepting D-2-D will you make that document part of your testimony? A. Yes.

Which said document is attached hereto and is made a part of this record and is in the words and figures following, to-wit:

(Not reprinted--See Record 165-185)

[Tr. 7] Interrogatory 24. Which, if any, of those documents were attached together when originally delivered?

A. If your question refers to the documents originally delivered to Marshall and Shuler, they included the following: D-2-Q, D-2-P, D-2-J, D-2-K, D-2-L, D-2-M, D-2-N, and D-2-O. If the question refers to the documents attached together when originally delivered to the Wilburns, it would include all those that I have already mentioned, plus D-2-I, D-2-H, and D-2-G. All the others, other than those I have mentioned in this letter series, were forwarded to the R. L. McKinney Agency, with the exception of that letter addressed to Wilburn marked D-2-D.

Interrogatory 25. Referring to D-2-K, which appears to be headed "Conditions," what is the fact as to whether they had a line drawn through them when originally delivered? A. Yes.

Interrogatory 26. Tell us about the line referred to in the next preceding interrogatory? A. With reference to the line drawn through the original contract, the policy was issued for boat risk coverage only, and the conditions did not apply when Marshall and Shuler were the owners under this contract. Prior to this time we had issued a regular yacht form of contract to these assureds. However, when the coverage was assigned under policy number Fireman's Fund YA 28579, shown as document D-2-G, effective June the 9th, 1948, that endorsement re-instated all paragraphs under heading, [Tr. 8] "Conditions," and were made a part of this policy.

Interrogatory 27. State the facts about these documents, *D-2-A through D-2-Q*, giving their history? A. If I understand your question, I think I have done so in the answers to previous questions. Mr. Rossow may be able to give something further about it.

Interrogatory 28. Who, if anyone, dealt with you and H. H. Cleaveland Agency on behalf of the Wilburns? A. Mr. R. L. McKinney.

Interrogatory 29. Did any of the Wilburns, or anyone other than McKinney on their behalf, ever have any contact with you or H. H. Cleaveland Agency on behalf of the Wilburns in connection with the insurance for the Wilburns on the boat "Wanderer"? A. No.

Interrogatory 30. Did you ever hear of R. L. McKinney except in connection with what he may have done for the Wilburns in connection with the boat "Wanderer"? A. No.

Interrogatory 31. Was R. L. McKinney ever an agent of yours? A. No.

Interrogatory 32. Was R. L. McKinney ever an agent of H. H. Cleaveland Agency? A. No.

Interrogatory 33. Have you been informed that this boat "Wanderer" is alleged to have been burned on or about *February 25, 1949*? A. Yes.

Interrogatory 34. Assuming the boat "Wanderer" burned on or about *February 25, 1949*, did R. L. McKinney or any one else advise you prior to that date, or for months [Tr. 9] thereafter, that the boat "Wanderer" was pledged to a bank or to any one else? A. No.

Interrogatory 35. When did you or anyone connected with H. H. Cleaveland Agency first know anything of the boat "Wanderer" being pledged to anyone to secure a debt? A. Not until many months after *February 25, 1949*, when Mr. Hayes representing the Fireman's Fund

Insurance Company informed me in connection with this lawsuit.

Interrogatory 36. When did you or anyone connected with H. H. Cleaveland Agency first know anything of the boat "Wanderer" being sold to a corporation? A. When Mr. Hayes so informed me and that was at the same time that he told me that the boat had been pledged to a bank.

Interrogatory 37. Did you know anything at all about any commercial use of the boat "Wanderer" when the documents D-2-A through D-2-Q, or any of them, were issued? A. No.

Interrogatory 38. What significance, if any, does the provision of D-2-K that seems to read: "Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the term of this Policy and shall not be hired or chartered unless permission is granted by endorsement hereon", has as to the risk and the premium? A. It increases both the risk and the premium if it's being used for commercial purposes, and if there is a breach of that warranty coverage no longer exists on a risk.

[Tr. 19] Interrogatory 39. What significance, if any, does the provision of D-2-K that seems to read: "It is also agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the Assurers" have as to the risk and premium? A. The insurance was originally issued for the insured interest shown on the contract. Rates were promulgated accordingly but with an assignment or transfer of interest the risk immediately changes complexion. As to pledge, as, for instance, by chattel mortgage or other encumbrance, the risk assumes a hazard entirely different from that originally contemplated and certainly a risk that's much greater. These conditions create definitely a moral hazard.

Interrogatory 40. What effect, if any, does the provision of D-2-K that seems to read: "This entire policy shall be void if the assured has conceded or misrepresented any material fact or circumstance concerning this insurance," and the rest of that paragraph of D-2-K have on the risk and premium? A. The question contains the word, "conceded." It should be "concealed." All hull coverage is written on the basis of good faith and honesty. The word of the assured or his representative is accepted as truth and completeness as to all exposures that might affect the risk and the company assumes and promulgates their rates and coverage based on this [Tr. 11] information and the assumption of its accuracy and completeness.

Interrogatory 41. What is the fact about the relative ease or difficulty of placing maritime insurance, that is to say, getting insurance with respect to boats, in 1948 and 1949? A. It depends when you refer to maritime insurance whether you're referring to commercial coverage or whether you're referring to pleasure type coverage. In the first instance, commercial coverage normally would necessitate a survey and considerable discussion as to rates and coverage before the insurance would become effective. With pleasure craft coverage we use what is known as the Yacht "A" Form Coverage and our companies will normally immediately bind the coverage for us at our request.

Interrogatory 42. Did the Fireman's Fund Insurance Company, so far as you know ever insure commercial risks on boats in 1948 and 1949? A. Not through our agency, and to the best of my knowledge only through our river marine agency, Neare Gibbs and Company of Cincinnati, Ohio.

Interrogatory 43. Or at any other time? A. My answer would be the same as to question 42.

Interrogatory 44. Did you personally, or H. H. Cleaveland Agency, either one, do an underwriting business in 1948 or 1949? A. No.

Interrogatory 45. What was the scope of the authority of H. H. Cleaveland Agency or anyone connected therewith, [Tr. 12] in 1948 and 1949, as to accepting risks as agent of Fireman's Fund Insurance Company? A. If your question refers to hull or wet marine coverage, it has been our policy always to submit the risk first to the Fireman's Fund before binding coverage. We feel that it's our obligation to the company that they be familiar with what their exposure is.

Interrogatory 46. If the authority referred to in the next preceding interrogatory was covered by written document, please produce it and attach it to this deposition as F. B. White Exhibit 1. A. I haven't answered it anyhow.

Which said document was marked F. B. White Exhibit 1, and is in the words and figures following, to-wit:

(Not printed—See original)

[Tr. 13] Interrogatory 47. Did H. H. Cleaveland Agency or anyone connected therewith have any oral or written authority to accept any risk on the boat "Wanderer" for Fireman's Fund Insurance Company in 1948 or 1949? A. No, this would be especially obvious in view of the location of the boat in Greenville.

Interrogatory 48. What was the course of business by which this policy was placed on the boat "Wanderer" for the Wilburns? A. My first contact with this business came with Mr. McKinney's telephone call and by correspondence with the Fireman's Fund and Mr. McKinney and telegrams to McKinney. Mr. Rossow was in Chicago shortly after this telephone conversation and arranged the coverage with the Fireman's Fund.

Interrogatory 49. What was the course of business by which it was increased from \$10,000 to \$40,000? A. This increase was made after Mr. Rossow had taken over the managerial function in this agency.

Interrogatory 50. Do you now think of anything further that might throw light on the situation we have been talking about? A. In answer to this question, I might add that for years I have been interested in the river and river transportation and have tried with varying degrees of success to place some commercial hull coverage and am somewhat familiar with the particular problem involved in placing coverage on commercial boats that might be chartered or used for excursion [Tr. 14] work. The fact of the matter is I never had any success in placing coverage of this type, and if at any time I had knowledge that the *Wanderer* was to be used for anything but pleasure purposes solely I would certainly have notified the company immediately. We have never attempted to use the Fireman's Fund for any wet marine coverage excepting private pleasure use of the yacht. We have never had coverage to the best of my knowledge on any hull of any description that had been pledged by chattel mortgage or any other means. All our commercial hull business has been placed through either the River Marine Agency of St. Louis, Neare Gibbs, Cincinnati, or the Marine Office of America in Chicago.

[Tr. 15] I, Arno N. Bufe of the City of Moline, County of Rock Island and State of Illinois, a Notary Public duly authorized by law to take the deposition of F. B. White, do hereby certify that the said witness, F. B. White, was first duly sworn by me to testify the truth, the whole truth and nothing but the truth in relation to the matters in controversy in the above entitled cause, so far as he

should be interrogated concerning the same; and he thereupon testified as above set forth to written interrogatories propounded to him by me, Arno N. Bufe, Notary Public, his testimony being taken by me in shorthand at the time and place specified, and afterwards transcribed by me.

I further certify that I am not counsel, relative or attorney of either party or otherwise interested in the result of this suit.

In testimony whereof I have hereunto set my hand and attached my notarial seal this 24th day of December, A. D. 1949.

Arno N. Bufe

Notary Public

(Seal)

[Tr. 1]

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Texas

Sherman Division

* * * (Caption—Civil Action No. 503) * * *

DEPOSITION

of

E. H. ROSSOW

Deposition taken on Friday, December 23, A. D. 1949, in the office of the H. H. Cleaveland Agency, 1800 Third Avenue, Rock Island, Illinois, before Arno N. Bufe, Notary Public in and for Rock Island County, Illinois.

[Tr. 2] E. H. ROSSOW, called as a witness, having been first duly sworn, testified as follows:

Direct Examination by Arno N. Bufe.

Interrogatory 1. Please state your name, age, residence and occupation? A. My name is E. H. Rossow. I am 43 years of age. I reside in Rock Island, Illinois, and I am employed as manager of the H. H. Cleaveland Insurance Agency.

Interrogatory 2. What was your business connection in 1947, 1948 and 1949? A. In 1947 I was special agent of the Fireman's Fund Insurance Company in Northern Illinois and left their employ on December the 31st, 1947, to take the position as manager of the H. H. Cleaveland Agency, where I have continued up until this date.

Interrogatory 3. How long have you been in the insurance business? A. Twenty-four years.

Interrogatory 4. What is wet marine insurance? A. Wet marine insurance is insurance covering vessel hulls and vessel cargo and P. and I. coverage, which last is

protection and indemnity insurance—it is protecting the liability of owners of vessels arising out of the operation of [Tr. 3] those vessels.

Interrogatory 5. In 1948 and 1949, who, if anyone, besides yourself and F. B. White had anything to do with handling wet marine insurance? A. If this question as I understand it refers to the business of the H. H. Cleaveland Agency, the handling of wet marine insurance was done only by F. B. White or myself with the exception of routine matters which would be handled by the clerical help under our direction.

Interrogatory 6. I show you a document that has been marked D-2-A through D-2-Q. Give me the history of that document, tell me the facts about it, page by page, referring to each page by the identification mark thereon? A. In examining this document I find that the pages marked D-2-I through D-2-Q in alphabetical order were on the policy as originally delivered to Marshall and Shuler, and this was before I came with the Cleaveland Agency. Page D-2-G, which in point of time, was the first page that came to my personal attention. On June 4, 1948, Mr. White discussed with me a telephone call that he had received from a R. L. McKinney of Dennison, Texas, with reference to the sale of the yacht Wanderer to Frank and Henry Wilburn, notice of which he had sent into the Fireman's Fund Insurance Company by a letter dated that date, but as I was going into Chicago and would visit the insurance company office he asked me to discuss the matter with them, which I did on Tuesday, June the 8th, 1948. [Tr. 4] When Mr. White and I discussed this matter on June 4, 1948, he handed me a copy of a letter dated May 27, 1948, having on it his penciled notations as shown on it, and a copy of a letter of June 4, 1948, addressed to the Fireman's Fund Insurance Company outlining the de-

is of his telephone conversation, and he told me that that what this letter of June 4, 1948, was. The letter of May 27, '48, has no connection with the Wilbarns' interest, but is written as a result of a telephone call from Mr. Robert Marshall's agent informing us that plans had been changed and that the boat would not be moved down to New Orleans from Greenville, Mississippi, as there was a possibility that the yacht would be sold at Greenville, Mississippi. I am giving these copies of said letters to Commissioner.

Which said papers were marked Rossow' Exhibit 1 and Rossow's Exhibit 2, and are in the words and figures following, to-wit:

May 27, 1948

00 Hull 25/50 P & I
 Telephone Frank & Henry, copart.
 Wilburn Bros., Dennison, Tex.
 L. McKinney Agency
 W. Woodard, Dennison, Tex.
 Woman's Fund Insurance Company
 West Jackson Boulevard
 Chicago 4, Illinois
 to: Mr. A. P. Winnebeck,
 Marine Division
 Policy YA-28579
 Robert D. Marshall et al
 re Art:

In response to your letter of May 18 regarding the house- covered under the above captioned policy, I have now learned that the plans have been changed and the boat will be moved down to New Orleans, as originally planned. It may be that the yacht will be sold but it may be done in the harbor at Greenville, Mississippi.

In any event, I informed the insured that if the yacht was moved, we would bind the coverage but they would be required to pay an additional premium based on the hazards surrounding the removal, and also for not in excess of the present amount of insurance which is \$10,000.

I hope that my action meets with your approval and if the yacht is sold or moved, we will notify you as promptly as possible.

ef

Yours very truly,
E. H. Rossow.

June 4, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attn: Mr. A. P. Winnebeck
Marine Division

Re: Policy YA-28579
Robert D. Marshall et al

Gentlemen:

Please be advised that as of today Frank and Henry Wilburn, doing business as Wilburn Brothers of Denison, Texas have purchased the "Wanderer" insured under the above policy. It is their plan to take the "Wanderer" down the Mississippi from Greenville, Mississippi to the Red River and proceed up the Red River to the Denison Dam at Denison, Texas. From there, she will be locked through to Texoma Lake.

The information we have is that the Red River is a navigable stream up to this point because they are letting more than enough water through for power purposes at the Denison Dam.

The boat will be used on Lake Texoma exclusively and Wilburn Brothers have asked that we continue this coverage this year on this basis. Of course, this will neces-

sitate the elimination of the Port Clause and the boat will be in year-round operation. Our assured have asked us to cooperate with Wilburn Brothers' agents in Denison, namely, R. L. McKinney Agency, 307 West Woodward, Denison, Texas.

We will appreciate your preparing the necessary endorsements at once so that we may, in turn, forward them to Mr. McKinney.

Very truly yours,

ef

F. B. White.

CC—R. L. McKinney Agency

Walter Hulstedt

[Tr. 5] The next thing under D-2-G in chronological order is a telegram addressed to F. B. White and received in our agency on June 7, 1948, and I am handing this to the Commissioner now.

Which said paper was marked Rossow's Exhibit 3 and is in the words and figures following, to-wit:

(Western Union Telegraph Form)

1948 Jun. 7 AM 10:43

C125 PD:DENISON TEX 7 947A

F B WHITE:

H H CLEVELAND AGENCY 1X:

RE LETTER JUNE 4 WANDERER. PLEASE CONFIRM COVERAGE FIREMAN'S FUND AND WIRE US COLLECT. THANKS:

R L MCKINNEY AGENCY.

[Tr. 6] On Tuesday, June 8, 1948, I saw Mr. A. P. Winnebeck of the Fireman's Fund Insurance Company at his office in Chicago and told him of the change in ownership and the moving of the boat down the Mississippi and up the Red River that was planned. We went over Mr. White's letter of June 4, 1948, to the Fireman's Fund Insurance Company, which I have already given to you. He called someone, but I do not remember whom. It sticks in my mind it was the U. S. Engineers' Office in Chicago, but I am not certain. Whoever he called confirmed to him that the Red River was then in good shape for navigation. We mentioned the fact that the policy as it stood for Marshall and Shuler was restricted to port risk perils and that the new buyer was requesting navigation perils, and after Mr. Winnebeck was assured of the amount of water in the Red River he consented to take the coverage on the basis of the ordinary navigating yacht risk for not only port perils but navigating perils and to transfer the cover to the new owners on the basic yacht form and subject to its normal conditions. These conditions are stated in D-2-K, and the perils are stated in D-2-L. Then a telegram was sent to the R. L. McKinney Agency on June the 8th, 1948, informing them that the Fireman's Fund were binding the transfer, and I am giving a copy of this telegram to you.

Which said paper was marked Rossow's Exhibit 4, and is in the words and figures following, to-wit:

(Western Union Telegraph Form)

June 8th, 1948

R. L. McKinney Agency
307 West Woodard
Denison, Texas

Fireman's Fund binding transfer Yacht Wanderer Texoma Lake and coverage to full marine perils. Endorsements follow.

H. H. Cleaveland Agency.

[Tr. 7] A letter dated June the 11th, 1948, was addressed to the Fireman's Fund Insurance Company and a copy sent to the R. L. McKinney Agency, and I am giving you a copy of this letter.

Which said paper was marked Rossow's Exhibit 5, and is in the words and figures following, to-wit:

June 11, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attn: Mr. A. P. Winnebeck,
Marine Division

Re: Policy No. YA-28579
Robert D. Marshall et al
Assigned to Frank and Henry Wilburn,
d/b/a Wilburn Brothers of Denison, Texas

Dear Art:

Following our conversation of Tuesday, June 8, we wired the R. L. McKinney Agency of Denison, Texas as per the copy enclosed in order that the new owner of the boat would know he had full coverage while the boat is being taken down the Mississippi and up the Red River to its new destination and also while at the new location.

We are also anxious to follow through and send the endorsements covering this transfer on to the insured and trust that it will be possible for you to prepare and forward them to us promptly.

Your consideration in this respect will be appreciated.

Yours very truly,

ef

E. H. Rossow.

CC—R. L. McKinney Agency
—Denison, Texas

Which said paper was marked Rossow's Exhibit 6, and is in the words and figures following, to-wit:

Very truly yours,
E. H. Rossow.

[Tr. 9] Shortly after July 2nd the endorsement was received from the Fireman's Fund Insurance Company, which is document D-2-G attached to the deposition of F. B. White, and this endorsement D-2-G was sent on to the McKinney Agency on July the 6th, 1948, and I give you the letter of transmittal.

Which said paper was marked Rossow's Exhibit 7, and is in the words and figures following, to-wit:

July 6, 1948

R. L. McKinney Agency
307 West Woodard
Denison, Texas

Re: Fireman's Fund Insurance Company
Policy No. YA-28579
Frank and Henry Wilburn

Gentlemen:

Following up our previous telegram and correspondence, we are now pleased to enclose an endorsement dated July 2 and made effective June 9, 1948, correcting the name of the insured and amending the coverage to cover full marine perils and also covering while the boat was being taken from Greenville, Mississippi to Texoma Lake.

Along with the endorsement, I am including an invoice which covers the additional charge for the increase in coverage and transfer of the boat, as well as the unearned portion of the original premium from June 9, 1948 until expiration of the contract on May 22, 1949.

We are pleased to be of service to you in connection with the arrangement of coverage and hope that the endorsement as submitted is satisfactory but if you feel that certain changes should be made, please get in touch with us again.

Very truly yours,

E. H. Rossow.

ef

[Tr. 10] The next thing referring to D-2-G was a letter from the R. L. McKinney Agency dated July the 8th, 1948, and I give you the original of the letter.

Which said paper was marked Rossow's Exhibit 8, and is in the words and figures following, to-wit:

R. L. MCKINNEY AGENCY

Insurance-Bonds

307 West Woodard Street

Denison, Texas

July 8, 1948

H. H. Cleaveland Agency
Rock Island, Illinois

Re: YA-28579—Frank and Henry Wilburn
d/b/a Wilburn Bros.

Dear Sirs:

We are in receipt today of endorsement to the above numbered policy.

We do not, however, have the original policy and it was our understanding that the original policy was left in your office.

We would appreciate you checking to see who has the original policy and if you still hold it, forward it to us so that we can go over this coverage with our insured.

Thanking you for your courtesies in this matter, we are,

Yours very truly,

R. L. McKinney Agency

By: R. L. McKinney

RLM:jj

[Tr. 11] I then wrote the R. L. McKinney agency enclosing the policy and renewal certificate identified in the document with Mr. White's testimony as D-2-H through D-2-Q in alphabetical order, and I give you the copy of this letter of transmittal of these documents.

Which said paper was marked Rossow's Exhibit 9, and is in the words and figures following, to-wit:

July 12th, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: YA28579—Frank and Henry Wilburn,
d/b/a Wilburn Bros.

Attention: Mr. R. L. McKinney

Gentlemen:

Promptly upon receipt of your letter of July 8th, we got in touch with Mr. Marshall's representative, and found that he had the policy and renewal certificate in his possession.

We are pleased to send it along to you and regret that these papers were not sent along previously.

Yours very truly,
E. H. Rossow.

EHR/t

[Tr. 12] I acknowledged a letter dated August 6, 1948, from Mr. R. L. McKinney on August the 10th, 1948, and give you the copy of this acknowledgment.

Which said paper was marked Rossow's Exhibit 10, and is in the words and figures following, to-wit:

August 10, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers,
Denison, Texas

Gentlemen:

This is to acknowledge your letter of August 6, enclosing a check in payment of the premium, asking for a correction under the above policy and also reporting a claim for damage.

We are reporting this claim and requesting a correction in name, as well as advising the company of the substitution of the diesel engine and you will hear further from us on these matters in due course.

Thanking you for the premium payment, we are

ef

Very truly yours,
E. H. Rossow.

[Tr. 13] On the same date, August 10, 1948, I also addressed the Fireman's Fund Insurance Company and give you a copy of this letter.

Which said paper was marked Rossow's Exhibit 11, and is in the words and figures following, to-wit:

August 10, 1948

Fireman's Fund Insurance Company

175 West Jackson Boulevard

Chicago 4, Illinois

Attn: Marine Department

Re: Policy No. YA-28579

Wilburn Brothers,

Denison, Texas

Gentlemen:

Attached, you will find a copy of the letter which we have received from the R. L. McKinney Agency in connection with the above captioned policy, requesting an endorsement correcting the name of the insured, reporting a small claim and also advising that there is some remodeling being done including the installation of a marine diesel engine to replace the gasoline engine.

We would like to have an endorsement correcting the name of the insured, your advices regarding the procedure to follow in connection with the claim and also information regarding the substitution of the diesel engine, which may affect the rate used in issuing this contract.

Please give this matter early attention and let your reply come forward.

Very truly yours,

E. H. Rossow.

ef

[Tr. 14] I also give you a letter I received from the Fireman's Fund Insurance Company dated August the 18th, 1948, in response to our letter of August the 10th, 1948.

Which said paper was marked Rossow's Exhibit 11-A, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

E. D. Lawson
Vice-President and Manager

August 18, 1948

H. H. Cleaveland Agency
3rd Ave. At Eighteenth St.
Rock Island, Illinois

RE: Wilburn Brothers
YA-28579

Gentlemen:

In accordance with your request of August 10th, we are pleased to enclose herewith an endorsement amending the name of the assured as requested.

It is also noted that the assured is making some extensive improvements including the installation of a Marine Diesel Engine to replace the Gasoline engine now on the vessel. If you will advise us when the installation of the Diesel Engine is complete, we will be pleased to allow a prorata credit for the balance of the policy year.

You will also find enclosed a Masters Protest form which we ask that you be kind enough to have completed by the assured and return to us, together with a bill for the repairs. Please return the form to the attention of Mr. Quillen of our Loss Department who will handle the claim to completion.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck
DM FF

[Tr. 15] I also give you a letter from the Fireman's Fund Insurance Company dated October the 1st, 1948, and referring to their letter of August the 18th, 1948.

Which said paper was marked Rossow's Exhibit 11-B, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

E. D. Lawson
Vice-President and Manager

October 1, 1948

H. H. Cleaveland Agency
3rd Avenue at Eighteenth Street
Rock Island, Illinois

Claim 806196
Policy No. YA-28579
Assured: Wilburns Boat Co.

Gentlemen:

On August 18th, 1948 Mr. A. P. Winnebeck of our Marine Underwriting Department forwarded you a Masters Protest form, which we asked that you be kind enough to have the assured complete in full and return to us along with the repair bills.

We are wondering at this time if the repairs have been completed, and when we may expect to receive the necessary papers.

Yours very truly,
W. R. Quillen
Claims Division

WRQuillen:es FF

[Tr. 16] On August 19, 1948, I forwarded Page D-2-B of the document included in Mr. White's testimony, and I give you a copy of this letter.

Which said paper was marked Rossow's Exhibit 12, and is in the words and figures following, to-wit:

August 19, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers,
Denison, Texas

Gentlemen:

Following up our letter of August 10 and our reply to your letter of August 6, we are now pleased to enclose an endorsement amending the name of the insured under this policy and along with this, a statement of loss to be completed in connection with the recent claim.

The substitution of a marine diesel engine to replace the gasoline engine on this vessel would entitle the insured to a rate credit and when the installation is complete, please advise us and we will then submit the facts to the company and arrange to secure a pro rata credit for the balance of the policy year.

A stamped, self-addressed envelope is included for the return of the statement of loss.

ef

Very truly yours,
E. H. Rossow.

[Tr. 17] I notice that D-2-A is attached to this same document and this was prepared in response to a letter of March the 2nd, 1948, requesting a copy of Page D-2-B. I give you this letter, which is Mr. R. L. McKinney's request for D-2-A.

Which said paper was marked Rossow's Exhibit 13, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

March 2, 1949

H. H. Cleaveland Agency
Rock Island, Illinois

Re: YA 28579—"The Wanderer"

Gentlemen:

Will you please send us a copy of the endorsement to the above policy which amended the named insured to Glen, Frank and Henry Wilburn d/b/a Wilburns Boat Company.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

JJ

[Tr. 18] I forwarded D-2-A to the R. L. McKinney Agency on March the 4th, 1949, and I give you a copy of that letter of transmittal.

Which said paper was marked Rossow's Exhibit 14, and is in the words and figures following, to wit:

March 4th, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Gentlemen:

YA 28579

"The Wanderer"

In reply to your letter of March 2nd, I am pleased to enclose a copy of the endorsement, effective August 6th, 1948, and amending the name of the insured.

I assume that this gives you the necessary information.

Yours very truly,

E. H. Rossow.

EHR/t

Tr. 19] I am now giving you a letter from the R. L. McKinney Agency dated September the 23d, 1948, requesting change in the name of the assured and stating that the same should read:

Glen, Frank and Henry Wilburn
d/b/a Wilburns Boat Company,
as shown on D-2-B.

Which said paper was marked Rossow's Exhibit 15, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

September 23, 1948

H. Cleaveland Insurance Agency
d Avenue at Eighteenth St.
Rock Island, Illinois

Re: YA-28579—Wilburn Brothers
Denison, Texas

Gentlemen:

We have enclosed herewith endorsement sent us changing named insured under the above policy. The endorsement should read as follows instead of as originally written.

Glen, Frank and Henry Wilburn
d/b/a Wilburns Boat Company
Thanking you for forwarding correcting endorsement,
are,

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

M:JJ

[Tr. 20] I give you a letter dated September 23, 1948, relating to a small loss.

Which said paper was marked Rossow's Exhibit 16, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

September 23, 1948

H. H. Cleaveland Insurance Agency
3rd Avenue at Eighteenth Street
Rock Island, Illinois

Re: YA-28579—Wilburn Brothers
Denison, Texas

Gentlemen:

We have enclosed herewith Statement of Loss under above policy and regret this statement being so late. This morning we checked over the bill with the insured and questioned in particular the item for 78 gallons of gasoline. He said this much gasoline was used because the Lake Texoma Boat & Dock Company used a gasoline machine for the repairs in doing this work. We also questioned the labor item but Mr. Wilburn said actually they did use this much labor as nearly as they could check and that someone was there watching the work all the time.

Trusting that you find this loss and statement in order, we are,

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

RLM:JJ

Enc.

[Tr. 21] I now give you a copy of my letter of September 29, 1948, in which I enclosed the corrected endorsement changing the name on Page D-2-B to Glen, Frank and Henry Wilburn, d/b/a Wilburns Boat Company as requested by the R. L. McKinney Agency.

Which said paper was marked Rossow's Exhibit 17, and is in the words and figures following, to-wit:

September 29, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

In response to your letter of September 23, we have corrected the endorsement changing the name of the insured and return it herewith.

We have also submitted to the Fireman's Fund Insurance Company the statement of loss for their further consideration.

In a previous letter in connection with this same policy, you explained that the insured was substituting a diesel engine and we wrote and advised that as soon as the substitution was complete, to give us this information so that we could submit it to the company for a credit in rate.

We have not heard from you in regard to this particular feature but assume that the matter is still in the process and that you will advise us as soon as the installation is completed.

Yours very truly,
E. H. Rossow.

ef

[Tr. 22] I now give you a letter from R. L. McKinney dated October 1, 1948, wherein he informed us that a diesel engine had been installed.

Which said paper was marked Rossow's Exhibit 18, and is in the words and figures following, to-wit:

R. L. McKINNEY AGENCY
Insurance-Bonds
307 West Woodard Street
Denison, Texas

October 1, 1948

H. H. Cleaveland Agency
3rd Ave. at Eighteenth St.
Rock Island, Illinois

Re: Policy Number YA 28579
Wilburn Brothers
Denison, Texas

Gentlemen:

Thank you for your letter of September 29.

The insured has advised this morning that his diesel engine has been installed and if you will have who ever is to inspect the yacht contact us we will contact the insured and make the necessary arrangements.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

RLM:JJ

[Tr. 23] I now give you a copy of my letter of October 4, 1948, addressed to the Fireman's Fund Insurance Company and informing them that a diesel engine had been installed and asking for premium credit for this installation.

Which said paper was marked Rossow's Exhibit 19, and is in the words and figures following, to-wit:

October 4, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois
Attn: Mr. Arthur P. Winnebeck
Marine Department

Re: Policy No. YA-28579
Wilburn Brothers, Denison, Texas

Dear Art:

Following up our previous letter explaining that a diesel engine was being installed in the boat insured under the above captioned policy, we are now pleased to report that the engine has now been installed and we trust that with this information, you will be in a position to endorse the policy giving the insured credit for this installation.

Yours very truly,

ef

E. H. Rossow.

[Tr. 24] I am giving you a copy of my letter of September 29, 1948, addressed to the Fireman's Fund Insurance Company and enclosing the Master's Protest and Statement of Loss referred to in Mr. R. L. McKinney's letter of September 23, 1948, which has previously been given to you.

Which said paper was marked Rossow's Exhibit 20, and is in the words and figures following, to-wit:
September 29, 1948

Fireman's Fund Insurance Company

175 West Jackson Boulevard

Chicago 4, Illinois

Re: Policy No. YA-28579

Wilburn Brothers

Attn: Mr. Quinn,

Loss Department

Gentlemen:

Following up a report of claim under the above captioned policy, we are now pleased to enclose a Master's Protest and Statement of Loss, together with a copy of the bill and a letter which we received from the Agency down in Denison, Texas, in connection with this claim.

We trust that with this information, you will be in a position to proceed with the closing of his claim and trust that a check in payment of the loss will come forward promptly.

Yours very truly,

E. H. Rossow.

ef

[Tr. 25] I now give you a copy of my letter of October the 28th, 1948, addressed to the R. L. McKinney Agency enclosing a check in the amount of \$15.95 which is the premium refund on account of the installation of the diesel marine engine and reflected on Page D-2-C of the document attached to Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 21, and is in the words and figures following, to-wit:

October 28, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

We are pleased to enclose our check in the amount of \$15.95 which represents the return premium under this contract due to the change-over from gasoline to diesel motor.

In addition to this, we are also pleased to enclose a check from the Fireman's Fund Insurance Company in the amount of \$341.35 which represents payment under the claim for damage to the boat.

We hope that the checks, as submitted, will be found satisfactory but if there is any question, please let us know.

Very truly yours,

ef

E. H. Rossow.

[Tr. 26] I give you a copy of our letter of October 27, 1948, addressed to Wilburn Brothers signed by E. M. Joens, which is the same as Page D-2-D of the document included with Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 22, and is in the words and figures following, to-wit:

October 27, 1948

Wilburn Brothers,
Denison, Texas.

Re: Fireman's Fund Insurance Co.
Policy YA-28579

Gentlemen:

Enclosed herewith please find copy of endorsement to attach to the above policy including coverage on a new Diesel Marine Engine which replaces a gasoline engine. A refund of \$15.95 is allowed.

If you have the serial number of the Diesel Engine, would you please advise us for completion of our files?

Thanking you, we are

Yours very truly,
H. H. Cleaveland Agency
E. M. Joens.

emj
encl

[Tr. 27] I give you a letter dated October 18, 1948, which we received from the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 22-A, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

E. D. Lawson
Vice-President and Manager

October 18, 1948

Mr. E. H. Rossow
c/o H. H. Cleaveland Agency
Third Avenue at Eighteenth St.
Rock Island, Illinois

Re: Policy YA-28579
Wilburn Brothers

Dear Ernie:

In accordance with your request of October 4th, we are pleased to enclose herewith an endorsement allowing the pro-rata return premium of the annual \$25 credit due for diesel motors.

You will note that we have left the engine and serial motors blank in the attached endorsement, and we ask that you kindly have the assured fill in this information and sign and return one copy for the completion of our records.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck
lae FF

[Tr. 28] I give you a letter dated December the 14th, 1948, from the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 22-B, and is in the words and figures following, to-wit:

FIREMAN'S FUND INSURANCE COMPANY

Western Department

175 W. Jackson Boulevard

Chicago-4

E. D. Lawson

Vice-President and Manager

December 14, 1948

H. H. Cleaveland Agency

3rd Ave. 18th St.

Rock Island, Illinois

RE: Wilburn Brothers

YA-28579

Gentlemen:

Under date of October 18th, we passed along an endorsement providing for a return premium of \$15.95 under the above policy and ask that you be kind enough to have the assured sign and return one copy and in addition give the engine and motor numbers of the diesel marine engine installed on the vessel insured under this policy to us.

As yet, we do not appear to have received the signed copy and information requested, and since quite some time has elapsed since the endorsement was passed along, we would appreciate your early attention to this matter.

Yours very truly,

A. P. Winnebeck

Marine Division

A. P. Winnebeck

DM

FF

[Tr. 29] I now give you a letter dated December the 14th, 1948, from R. L. McKinney stating that the insured has an investment of \$40,000.00 in this yacht at the present time and asking us to advise what rate would be charged to increase the coverage to \$40,000.00. There are my pencil notations on the bottom of the letter of December the 14th, 1948, showing that a telegram was sent to the R. L. McKinney Agency estimating the cost of the additional insurance, and I also give you a copy of the telegram itself, dated December 20, 1948.

Which said letter was marked Rossow's Exhibit 23, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

December 14, 1948

AIR MAIL

H. H. Cleaveland Agency
Rock Island, Illinois

Re: Firemen's Fund Policy YA 28579
Wilburn Brothers

Dear Sir:

The above named insured has an investment of \$40,000.00 in this yacht at the present time and we will appreciate you advising what rate will be charged to increase the coverage to \$40,000.00 which would amount to an additional \$30,000.00.

In addition to the CO 2 extinguishing system and the extinguishers which were on the yacht, our insureds have installed two fire hydrants and pumps with 50 feet of hose on each, each pump having a pressure of 40 to 50 pounds.

Of course the water for these hoses would be pumped directly out of the lake. They also have two additional 5 pound CO 2 extinguishers and 4 quart size tetrachloride extinguishers.

All the additional equipment has been approved by the Coast Guard on their last inspection.

We will appreciate your early advices.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

Which said copy of telegram was marked Rossow's Exhibit 24, and is in the words and figures following, to-wit:

WESTERN UNION

December 20, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Estimate cost of Thirty Thousand additional Two Hundred and Seventy Five Dollars unexpired term. Binding this amount. Please advise.

H. H. Cleaveland Agency

[Tr. 30] I now give you a copy of my letter of December the 22d, 1948, addressed to the Fireman's Fund Insurance Company confirming our telephone conversation in regard to a rate for the increase in coverage to \$40,000.00. In our telephone conversation with the Fireman's Fund Insurance Company the binder was authorized at the rate mentioned in the letter after we had read to the Fireman's Fund on the telephone Mr. R. L. McKinney's letter of December 14, 1948. The telephone conversation referred to in this letter was on December 20, 1948, and was one I had with Mr. A. P. Winnebeck of the Fireman's Fund Insurance Company. This letter was dictated by me on December 21, 1948, but transcribed by my secretary on December 22, 1948, dated December 22, 1948.

Which said paper was marked Rossow's Exhibit 25, and is in the words and figures following, to-wit:

December 22, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois
Attn: Mr. A. P. Winnebeck
Marine Department
Policy No. YA-28579

Gentlemen:

This is to confirm our telephone conversation of yesterday wherein you quoted a rate of 2.175 to be used in increasing the coverage under this policy from \$10,000 to \$40,000.

We submitted this rate to the insured and explained that we were binding the additional insurance and as soon as we have his instructions, we will write you further.

Very truly yours,

ef

E. H. Rossow.

requesting the copy of the endorsement which is Page D-2-C [Tr. 31] I now give you a copy of my letter of December the 16th, 1948, addressed to the R. L. McKinney Agency of the document included with Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 26, and is in the words and figures following, to-wit:

December 16, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Policy No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

Back in October, we sent you an endorsement for the above policy showing a return premium of \$15.95 which represented the saving because of the substitution of the diesel engine.

The endorsement was in duplicate and a copy was to be signed and returned along with the engine and motor numbers of the diesel engine.

We hope that you still have this endorsement in your possession and trust it will be possible for you to complete and forward it.

ef

Very truly yours,
E. H. Rossow.

[Tr. 32] I now attach a letter from the R. L. McKinney Agency dated December the 21st, 1948, acknowledging my telegram of December 20th, and asking that the policy be endorsed increasing the coverage by \$30,000.00.

Which said paper was marked Rossow's Exhibit 27, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodward Street
Denison, Texas

December 21, 1948

AIR MAIL

H. H. Cleaveland Agency
Rock Island, Illinois

Re: YA 28579 - Wilburn Brothers

Dear Sirs:

Thank you for your telegram of December 20. Please endorse the above policy increasing the coverage by \$30,000.00.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney, Jr., JJ.

JJ

[Tr. 33] I now give you a copy of my letter of December 30, 1948, addressed to the Fireman's Fund Insurance Company requesting the endorsement increasing the amount by \$30,000.00 and making the total coverage \$40,000.00.

Which said paper was marked Rossow's Exhibit 28, and is in the words and figures following, to-wit:

December 30th, 1948

Fireman's Fund Insurance Company
Insurance Exchange Building
Chicago, Illinois

Attn: A. P. Winnebeck
Pol. No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

Following up our letter of December 22nd, we have now received a request to endorse this Policy increasing the amount by \$30,000 and making the total coverage \$40,000. Based on the rate of \$2.175 which you quoted during our telephone conversation, I have estimated the cost for this additional insurance to be \$275.00 for the unexpired term, and have so advised the insured.

I assume that you will agree with my figures in this respect and send along the endorsement accordingly.

Yours very truly,
E. H. Rossow.

EHR/t

[Tr. 34] I give you a letter dated December the 28th, 1948, from the Fireman's Fund Insurance Company confirming the binding of the \$30,000.00 additional insurance at a rate of 2.175.

Which said paper was marked Rossow's Exhibit 29, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

December 28, 1948

E. D. Lawson

Vice-President and Manager

Mr. E. H. Rossow

c/o H. H. Cleaveland Agency

Third Avenue at 18th Street

Rock Island, Illinois

Re: Wilburn Brothers

Policy YA-28579

Dear Ernie:

This is to acknowledge receipt of yours of December 22nd and to confirm binding an additional \$30,000 of insurance at a rate of 2.175 under the above policy.

As you can readily realize, this tremendous increase in the valuation of this vessel comes as somewhat of a surprise and we are, of course, anxious to substantiate the value of this vessel at an early date. We would suggest that you request the assured to have a competent marine surveyor inspect the vessel, and send us a copy of the report together with the surveyor's estimate of its present day value, or if there is no surveyor available, a new completed yacht application together with bills and invoices

for the work done and for the new installations completed would probably give us enough information to substantiate the value claimed by the assured.

If this houseboat actually is worth \$40,000, then we shall have to either increase the amount of insurance or amend the valuation clause in the policy, thereby making the assured a coinsurer.

In view of the above considerations and since it has been necessary to secure reinsurance on the additional amount of insurance required, we are, of course, extremely anxious to be advised as soon as possible whether or not our quotation has been accepted by the assured, and to obtain the required documents or survey to give us some idea of the actual market value of this boat.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck
lae FF

[Tr. 35] I now give you a letter from the Fireman's Fund Insurance Company dated January 3, 1949.

Which said paper was marked Rossow's Exhibit 30, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

January 3, 1949

E. D. Lawson

Vice-President and Manager

Mr. E. H. Rossow

Third Avenue at 18th Street

Rock Island, Illinois

Re: Policy YA-28579

Wilburn Brothers

Dear Mr. Rossow:

Thanks for your letter of December 30th in connection with the above.

However, we arrive at an additional premium of \$234.01 developed as follows—annual premium on valuation of \$40,000. at a rate of 2.175, \$870.00; annual premium on \$10,000 at a rate of 3.125, \$312.50—the difference, \$558.50; pro-rata percentage .419 or \$234.01.

It would appear that you have merely computed the additional \$30,000. at the new rate then pro-rated the additional charge to arrive at your \$275.00.

However, in view of our explanation of the proper way to arrive at this charge, we will assume that you would prefer to have us put through the additional as \$234.01 and we would appreciate your confirmation.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck

lae

FF

[Tr. 36] I now give you a copy of my letter dated January 4, 1949, addressed to the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 31, and is in the words and figures following, to-wit:

January 4, 1949

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attn: Mr. A. P. Winnebeck,
Marine Division
Policy YA-28579
Wilburn Brothers

Gentlemen:

In response to your letter of January 3, we are pleased to learn that your figures have developed a lesser additional premium for the increase in amount. You may prepare the endorsement accordingly.

Incidentally, a previous endorsement allowing a return premium of \$15.95 for the installation of a diesel marine engine, and which was to be signed and returned, has been lost. If you will send along two additional copies of this endorsement, we will follow through for the necessary signature.

Very truly yours,
E. H. Rossow.

ef

[Tr. 37] I now give you a letter dated January 18, 1949, from the Fireman's Fund Insurance Company enclosing the endorsement increasing the amount of insurance to \$40,000.00 and this endorsement so enclosed shown on Page D-2-F of the document included in Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 32, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

January 18, 1949

E. D. Lawson

Vice-President and Manager

Mr. E. H. Rossow

Third Avenue at 18th Street

Rock Island, Illinois

Re: Wilburn Brothers

Policy YA-28579

Dear Ernie:

We are now pleased to enclose herewith endorsement increasing the amount of insurance hereunder to \$40,000. effective December 20th. We trust you will find the endorsement to be in order.

We wish to refer you to our letter of December 28th concerning a Marine survey or new completed application on this yacht, and of course, we are most anxious to get this information as soon as possible.

We are also enclosing two extra copies of endorsement dated October 4, 1948 and we request that you be kind enough to have the sign and return one copy at an early date.

A. P. Winnebeck
lae FF
Enc.

Yours very truly,
A. P. Winnebeck
Marine Division

[Tr. 38] I now give you a copy of my letter of January 25, 1949, addressed to the R. L. McKinney Agency and enclosing the endorsement which is shown on Page D-2-F of the document attached to Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 33, and is in the words and figures following, to-wit:

January 25, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas
Policy No. YA-28579
Wilburn Brothers
Gentlemen:

Following up your request of December 21, we are now pleased to enclose an endorsement increasing the amount of this policy to \$40,000 and are happy to explain that we were successful in securing this additional coverage for a premium less than we previously quoted.

In addition to this endorsement, we are including a duplicate set of the endorsement showing the installation of the diesel marine engine which we would like to have completed by including the engine number and a copy signed by the insured returned for submission to the Fireman's Fund Insurance Company.

Because of the additional increase in value of the boat insured, the company asks that the assured have a competent marine surveyor inspect the vessel and complete the attached application and I hope that you will be in a position to arrange to have this done.

We trust that this matter has been handled to your satisfaction and await your reply.

Very truly yours,
E. H. Rossow.

ef

[Tr. 39] I now give you a letter of December 31, 1948, which I received from R. L. McKinney.

Which said paper was marked Rossow's Exhibit 34, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

December 31, 1948

H. H. Cleaveland Agency
Rock Island, Illinois
Attn: Mr. E. H. Rossow
Re: Policy No. YA-28579

Wilburn Brothers
Denison, Texas

Dear Sir:

In reply to your letter of December 16 we wish to advise that we have no record of receiving the endorsement substituting the diesel engine on this boat. We did, however, receive the check.

If you will forward us duplicates of this endorsement we shall be glad to have them signed and returned.

Yours very truly,
R. L. McKinney Agency
By: Robt. L. McKinney

JJ

[Tr. 40] I now give you a letter of February 4, 1949, from the R. L. McKinney Agency.

Which said paper was marked Rossow's Exhibit 35, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

February 4, 1949

H. H. Cleaveland Agency
Rock Island, Illinois
Re: YA-28579
Wilburn Brothers

Gentlemen:

We have enclosed herewith signed copy of endorsement to above policy indicating a diesel engine has been installed replacing the gasoline engine.

Yours very truly,

R. L. McKinney Agency
by: Robt. L. McKinney

RLM:JJ

Enc,

[Tr. 41] I give you a copy of my letter of February the 11th, 1949, addressed to the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 36, and is in the words and figures following, to-wit:

February 11, 1949.

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attention: Mr. Arthur P. Winnebeck
Gentlemen:

Policy No. YA28579

Wilburn Brothers

We are now pleased to enclose a signed copy of the endorsement of October 4 showing the replacement of the gasoline engine in connection with the yacht insured under this policy and assume that with this information, the file in connection with this item will be completed.

Very truly yours,
E. H. Rossow.

ef

[Tr. 42] Interrogatory 7. Did R. L. McKinney, or anyone claiming to be R. L. McKinney, or anybody on behalf of the Wilburns, ever talk to you about that document or any part of it, or the risk that it purports to cover? A. No. My answer refers to D-2-A through D-2-Q included with Mr. F. B. White's testimony.

Interrogatory 8. Did anyone named Wilburn, or anyone claiming to be so named, ever talk to you about D-2-A through D-2-Q, or the risk it purports to cover, face to face or over the telephone? A. No.

Interrogatory 9. Did you ever know of Fireman's Fund Insurance Company writing a commercial wet marine hull insurance policy? A. No.

Interrogatory 10. Did H. H. Cleaveland Agency while you have been connected with it ever have general authority to bind Fireman's Fund Insurance Company wet marine hull or protection and indemnity risks? A. No.

Interrogatory 11. What authority, if any, did it have as to the subject matter mentioned in the next preceding interrogatory? A. As I understand the authority given us by the Fireman's Fund Insurance Company contract, a copy of which is attached to Mr. R. B. White's testimony, our binding restrictions were limited to Rock Island and vicinity.

Interrogatory 12. When any of the documents D-2-A through D-2-Q were issued, what knowledge did you or anyone connected with your agency have, that the boat "Wanderer" had [Tr. 43] been or would be used for any commercial purpose, or had been or would be pledged as security for debt, or had been or would be sold by the Wilburns? A. None.

Interrogatory 13. What is the fact as to whether or not all terms and endorsements on the document D-2-A

through D-2-Q that were asked for on behalf of the Wilburns were placed on the document and there appear?

A. They were.

Interrogatory 14. Do you now think of anything else that might throw any light on the situation? A. No, I can't think of anything else that might throw any light on the situation.

Cross-Examination by Arno N. Bufe

[Tr. 44] Cross-Interrogatory No. 1. Please attach to your answers to this deposition copies of all communications passing between the H. H. Cleaveland Agency of Rock Island, Illinois, and R. L. McKinney Agency of Denison, Texas, with respect to the yacht "Wanderer" or any insurance for the benefit of the Wilburn Brothers or Wilburn Boat Company? A. The greater part of the correspondence requested in this question has been attached to my previous testimony, and I now give you all the rest.

Which said papers were marked Rossow's Exhibits 37 through 45, inclusive, and are in the words and figures following, to-wit:

[EXHIBIT 37] WESTERN UNION
RLCO16 PD-DENISON TEX 25 817A
H. H. CLEVELAND AGENCY-RL

1949 FEB 25 AM 9:14
-WANDERER, POLICY NUMBER YA 28579 WILBURN
BROTHERS BURNED TODAY. ADVISE IF YOU
WANT US TO GET ADJUSTER ON IT.

R L MCKINNEY AGENCY.
—YA 28579—

[EXHIBIT 38]

WESTERN UNION

FEBRUARY 25, 1949

R. L. McKINNEY AGENCY
307 WEST WOODARD STREET
DENISON, TEXAS

HAVE CONTACTED FIREMAN'S FUND REGARD-
ING LOSS OF WANDERER. THEY ARE CONTACT-
ING GENERAL ADJUSTMENT BUREAU, DALLAS.

H. H. CLEVELAND AGENCY

[EXHIBIT 39]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

August 6, 1948

H. H. Cleaveland Agency
Rock Island, Illinois

Re: Policy Number YA 28579
Wilburn Brothers, Denison, Texas

Dear Sirs:

We have enclosed herewith check in payment of premium on above policy amounting to \$419.56 and regret that the insured was so slow in getting this check to us but they were busy bringing the boat up the river, getting it over the dam and back around into Lake Texoma and wanted to go over the policy with us before paying the premium.

Please endorse the policy to the name of Glenn, Frank and Harry Wilburn d/b/a Wilburns Boat Company.

In coming up the river this boat struck a sand bar and damaged two planks in the hull which the insured has had the Texoma Boat & Dock Company survey and repair. We don't believe the damage amounts to very much and trust that this manner of handling will be satisfactory to you. The Lake Texoma Boat & Dock Company do a very nice job and are competent to handle this type of work. There are two yacht repair businesses on the Lake at the present time.

This repair had to be done promptly as the boat was reinspected by the Coast Guard and they insisted that this be done at that time so they could approve the hull before it was put on the Lake and they have approved the hull and this repair.

These insureds are doing some slight remodelling including the installation of a Marine diesel engine to replace the gasoline engine which has been on the boat. It might be that the Firemen's Fund will want their Dallas Marine man to inspect the boat when this work has been completed.

(Paragraph quoted and, stricken out, on objection at the trial at R. 115 omitted here.)

Thanking you for your courtesy in this matter, we are,

Yours very truly,

R. L. McKinney Agency

By: R. L. McKinney

RLM:JJ

[EXHIBIT 40]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

February 25, 1949

AIR MAIL

H. H. Cleaveland Agency
Rock Island, Illinois

Re: Firemens Fund Policy YA 28579
Wilburn Brothers - "WANDERER"

Dear Sirs:

The above insured reported to us this morning that this yacht burned about 1:10 A.M. today.

Jack Bland, night watchman at the Burns Run Resort, off of which the yacht was moored called our insured at 1:10 A.M. advising that the boat was on fire and Henry and Frank Wilburn got out to the Lake at 1:30. When they arrived, the top structure had burned down to the deck level and they got in a boat with some fire extinguishers and had started toward the Wanderer in an attempt to put out the fire when it exploded and sank.

Frank and Alton Wilburn and their engineer moved the yacht from the Texoma Boat and Dock Company on the Texas side where it had been temporarily during our recent ice storm in January for protection from the weather to this mooring on the Oklahoma side about 5:00 P. M. Tuesday, February 22 and the yacht was in good shape. This buoy is about 300 feet off shore.

One of the Wilburn men have been going out each day to inspect it to see that everything was alright. Frank Wilburn had inspected the boat about 4:30 P.M. yesterday, February 24th and the boat was in good shape at that

time and he noticed nothing wrong. The fire apparently from some cause must have started between midnight and 1:00 this morning.

There is a Firemens Fund Office in Dallas and we have forwarded a copy of this letter to them. Mr. C. E. DeWitt, 928 Kirby Bldg., Dallas, Texas, a marine adjuster has handled a number of losses up here recently for Frank Rimmer, Marine General Agent in Dallas. The General Adjustment Bureau Office in Sherman has also handled some losses.

Please advise any way we can be of assistance.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

RLM:JJ

[EXHIBIT 42]

May 27, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy YA-28579
Wilburn Bros.

Gentlemen:

We are pleased to acknowledge receipt of your letter of May 23 with reference to the claim under the above policy and we are passing the original of this letter on to the company, as you requested.

Very truly yours,
ef E. H. Rossow.

[EXHIBIT 43]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

July 8, 1949

H. H. Cleaveland Agency
Rock Island, Illinois
Re: Policy No. YA-28579
Wilburn Boat Company

Dear Sirs:

We would appreciate having any information you have been able to obtain about the status of this loss.

We have been under considerable criticism due to the fact that we more or less obtained the insurance for these insureds and haven't even been able to get them any information on the company's thought on the matter.

Thanking you for your continued cooperation, we are

Yours very truly,

R. L. McKinney Agency

By: Robt. L. McKinney

RLM:JJ

EXHIBIT 44]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

October 21, 1949

L. H. Cleaveland Agency

Rock Island, Illinois

Dear Sirs:

We have misplaced in our files our letter of transmittal to you one the survey on the yacht, "Wanderer", insured under the Fireman's Fund Policy No. YA-28579.

This survey was sent to you at the request in your letter of January 25, 1949 and should have been received in your office in a comparatively short time after that date. We have enclosed a self-addressed envelope for your convenience and would appreciate your sending us this information.

Yours very truly,

R. L. McKinney Agency

By: Robt. L. McKinney

M:cjc

enclosure

[EXHIBIT 45]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

October 25, 1949

H. H. Cleaveland Agency
Rock Island, Illinois

Dear Sirs:

In our letter to you last week on the Wilburn Boat Company for whom you insured the yacht "Wanderer" we did not apparently make our letter very clear, all we want to find out from you is the date you received the survey we prepared on this yacht.

The secretary in our office at the time this was sent to you, prepared and mailed this survey on February 7, 1949. We still find no letter for transmittal in our files and therefore would appreciate your sending us this information.

Yours very truly,
R. L. McKinney Agency
By: Robt. L. McKinney

RLM:cjc

[Tr. 45] Cross-Interrogatory No. 2. Please attach to your answers to this deposition copies of all communications passing between the office of H. H. Cleaveland Agency of Rock Island, Illinois and the Fireman's Fund Insurance Company with respect to the yacht "Wanderer" insurance in favor of the Wilburn Brothers or in favor of Wilburn Boat Company? A. The greater part of the correspondence requested in this question also has been attached to my previous testimony, and I now give you all the rest.

Which said papers were marked Rossow's Exhibits 46 and 47, and are in the words and figures following, to-wit:

[EXHIBIT 46]

October 27, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Gentlemen:

Your letter of October 21 addressed to this Agency has been sent on to the Fireman's Fund Insurance Company as they have our file in connection with the subject matter.

Yours very truly,
E. H. Rossow.

ef

[EXHIBIT 47]

March 2nd, 1949

Fireman's Fund Insurance Company
Insurance Exchange Building
Chicago, Illinois
Attention: Ray Harding
Loss Department

Gentlemen:

Wilburn Brothers
Policy No. YA-28579

Following up our telephone call reporting the loss of the yacht "Wanderer" insured under this policy, we are now enclosing a copy of the letter which we received from the McKinney Agency, outlining the circumstances surrounding the fire.

We assume that this information will be of value to you, and if we can be of any further assistance in connection with this claim, please let us know.

Yours very truly,
E. H. Rossow,

EHR/t

[Tr. 46] There are no communications passing between the office of H. H. Cleaveland Agency of Rock Island, Illinois, and the Fireman's Fund Insurance Company with respect to any yacht Wanderer insurance in favor of Wilburn Boat Company.

And Thereupon Rossow's Exhibits 48, 49, and 50 were marked, and are in the words and figures following, to-wit:

May 27, 1949

[EXHIBIT 48]

Fireman's Fund Insurance Company

175 West Jackson Boulevard

Chicago 4, Illinois

Attention: Mr. Ray Harding,

Loss Department

Re: Wilburn Bros.

Policy No. YA-28579

Gentlemen:

Enclosed, you will find the original of a letter which we received from the R. L. McKinney Agency along with our acknowledgment and with reference to the claim under this policy.

Incidentally, you never did return our correspondence in connection with the various arrangements of insurance coverage under this contract and we would like to have you send this correspondence on to us so that our file will be complete.

Very truly yours,

E. H. Rossow.

ef

[EXHIBIT 49]

Denison, Texas,
March 23, 1949

R. L. McKinney Agency,
307 W. Woodard Street,
Denison, Texas,

H. H. Cleaveland Agency,
Western Marine Department
A-838-175 W. Jackson Blvd.
Chicago, Ill.

Fireman Fund Insurance Co.
San Francisco, California.
Gentlemen:

Enclosed herewith please find Sworn Statement in Proof of Loss covering the yacht "Wanderer".

Since we have not been furnished as requested a company form proof of loss you will please consider this formal proof of loss.

(Paragraph quoted, and stricken out, on objection at the trial at R. 122 omitted here)

Will you please let us have your prompt reply.

Yours very truly,

/s/ L. G. Wilburn

L. G. Wilburn, President
Wilburn Boat Company, a
corporation, and as Part-
ner of Wilburn Brothers,
d/b/a Wilburn Boat Com-
pany.

[EXHIBIT 50]

February 9, 1949

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attention: Mr. Arthur P. Winnebeck

Gentlemen:

Wilburn Brothers

Policy No. YA-28579

In response to your letter of January 18, we are pleased to enclose an up-to-date application and survey report covering the yacht insured under the above policy.

We hope that you will find the information contained in these papers in order but if there is any question, please let us know.

Very truly yours,

E. H. Rossow.

ef

[Tr. 47] In connection with letter dated February 9th, 1949, I hand you a photostat of the application and survey received from the R. L. McKinney Agency.

Which said document is attached hereto, and is in the words and figures following, to-wit:

(Not printed—See original and printing at R. 190-194)

[Tr. 48] Cross-Interrogatory No. 3. If you have not already done so in response to the previous questions, please attach copies of all correspondence and communications with either R. L. McKinney Agency of Denison, Texas, or Fireman's Insurance Company relating to Policy No. YA-28579? A. To the best of my knowledge and belief and

after a thorough search of our records, the correspondence included in my previous testimony and the correspondence attached to these questions is our complete file on the subject matter.

[Tr. 49] I, Arno N. Bufe of the City of Moline, County of Rock Island and State of Illinois, a Notary Public duly authorized by law to take the deposition of E. H. Rossow, do hereby certify that the said witness, E. H. Rossow, was first duly sworn by me to testify the truth, the whole truth and nothing but the truth in relation to the matters in controversy in the above entitled cause, so far as he should be interrogated concerning the same; and he thereupon testified as above set forth to written interrogatories propounded to him by me, Arno N. Bufe, Notary Public, his testimony being taken by me in shorthand at the time and place specified, and afterwards transcribed by me.

I further certify that I am not counsel, relative or attorney of either party or otherwise interested in the result of this suit.

In testimony whereof I have hereunto set my hand and attached my notarial seal this 24th day of December, A.D. 1949.

Arno N. Bufe,
Notary Public

(Seal)